SUBMISSION AND RESEARCH REPORT ON THE JUDICIAL RECORDS OF NOMINEES FOR APPOINTMENT TO THE HIGH COURT AND ELECTORAL COURT

OCTOBER 2019

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INTRODUCTION

1. The Democratic Governance and Rights Unit ("DGRU") is an applied research unit based in the Department of Public Law at the University of Cape Town. DGRU's vision is of a socially just Africa, where equality and constitutional democracy are upheld by progressive and accountable legal systems, enforced by independent and transformative judiciaries, anchored by a strong rule of law. The mission of the DGRU is to advance social justice and constitutional democracy in Africa by conducting applied and comparative research; supporting the development of an independent, accountable and progressive judiciary; promoting gender equality and diversity in the judiciary and in the legal profession; providing free access to law; and enabling scholarship, advocacy and online access to legal information. The DGRU has established itself as one of South Africa's leading research centres in the area of judicial governance

2. The DGRU recognises judicial governance as a special focus because of its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU has an interest in ensuring that the judicial branch of government is strengthened, is independent, and has integrity. The DGRU's focus on judicial governance has led to it making available to the Judicial Service Commission (JSC) research reports on candidates for judicial appointment, and to DGRU researchers attending, observing and commenting on the interviews of candidates for judicial appointment.[1] Such reports have been complied for the JSC interviews in September 2009, and for all further JSC interviews from October 2010 onwards

3. The intention of these reports is to assist the JSC by providing an impartial insight into the judicial records of the short-listed candidates. The reports are also intended to provide civil society and other interested stakeholders with an objective basis on which to assess candidates' suitability for appointment to the bench.

4. Normally, we would set out an explanation of the methodology of the report, and then conclude with some comments and observations from observing the recent sittings of the JSC. However, the Commission's October 2019 sitting will be the first sitting for many commissioners, after the re-composition of the JSC following the national and provincial government elections earlier this year. We felt this would be a good opportunity to use this report to introduce our work to the new commissioners in a little more detail.

THE DGRU'S WORK ON JUDICIAL APPOINTMENTS

5. The DGRU's belief in the importance of the judiciary will be apparent from our vision and mission, as described in the previous section. Over the years, our focus on the judiciary has expanded beyond South Africa. We are recognised as a resource partner of the Southern African Chief Justices' Forum, and are involved with the UNODC's Global Judicial Integrity

[1] The reports are available at http://www.dgru.uct.ac.za/reports-candidates-jsc-hearings and http://www.dgru.uct.ac.za/research-reports-0

Network.[2] We believe that these interactions have allowed us to develop a broader perspective on the appointment of judges, which we attempt to share with the JSC and other interested stakeholders as best as we can.

6. In South Africa, one of the major and most persistent issues that is raised regarding the appointment of judges concerns the transformation of the judiciary. The constitution requires that the judiciary be transformed. The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered by the JSC when it recommends appointment to the Bench. We submit that the transformation imperative does not relate only to numbers, but must also include an examination of issues such as the judicial philosophy and life experience of candidates, to ensure that those who are appointed as judges are committed to the social and economic transformation of South Africa.

7. The Constitution also requires the appointment of judges who are appropriately qualified and fit and proper. We believe that the following criteria are relevant to determining whether a candidate is fit and proper:
   - A commitment the Constitution's underlying values of human dignity, freedom and equality;
   - Independence of mind – the courage and disposition to act independently, free from partisan political influence and private interests;
   - The disposition to act fairly, impartially and without fear, favour or prejudice;
   - High standards of ethics and honesty;
   - A judicial temperament, which includes qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness.

8. To determine whether a candidate is appropriately qualified, we believe this includes a consideration of a candidate's formal qualifications, experience and potential. Constitutional Court judges must be qualified not only in respect of the general body of law but they must be equipped to give meaning to constitutional values – indeed, it may well be argued that this applies to all judges.

9. Our research reports consist of summaries of judgements written by candidates who are to be interviewed by the JSC during the meeting in question, as well as other material such as summaries of academic articles or public speeches by the candidates. Further details of the methodology employed in compiling the reports are set out in the next section. We believe that one of the most effective ways of assessing a candidate's suitability for judicial office is to scrutinise how they have dealt with issues they would come across were they to be appointed as judges.

10. To this end, our reports present a sample of judgements which we have summarised, in order to show why and how they have arrived at a particular decision. As we make clear, we do not try to advocate for the appointment or non-appointment of any individual candidate.

[2] See https://sacjforum.org/ and https://www.unodc.org/ji/ for more information about these organisations.

We hope that the members of the JSC will be able to use this research to identify issues that might be relevant to the suitability of candidates for judicial office, and to ask questions to establish that suitability.

11. We also comment on aspects of the process by which the interviews are conducted. A fair, as well as transparent, interview process is, we submit, essential for the legitimacy of the appointment and to public confidence in the judiciary. Based on our observations of the JSC interviews over a long period of time, our intention is to offer constructive suggestions which we hope can assist the JSC in performing its crucial constitutional role as well as possible.

12. We will briefly mention some of our observations of what we think are particularly important issues in ensuring a fair interview process.

    - Questions tracking publicly available criteria
      We suggest that the criteria provided in sections 174(1) and (2) of the Constitution are quite broad, and it would be valuable for the JSC to agree and publicise supplementary criteria that would amplify the criteria found in the Constitution.[3] These criteria could allow for sufficient flexibility, and could be revisited by the JSC from time to time. We think that undertaking this exercise would be particularly important for two reasons: first, it may assist commissioners in focusing their questions on the specific criteria that are being sought. This may well assist with some of the other issues we identify below. Second, if these criteria are published, potential candidates a clearer sense of what the JSC is looking for, and whether they fulfil those criteria.

    - Timing of interviews
      We have frequently observed significant inconsistencies in the length of interviews, with some candidates for the same position being interviewed for very different lengths of time. Of course, sometimes circumstances will dictate that one candidate may need to be interviewed for longer than another. But as a general principle, we think it is advisable out of fairness to the candidates and for the credibility of the process that candidates being interviewed for the same or a similar position should be interviewed for a broadly similar time. Interviews that take place long after they are scheduled to, and run late into the night, are likely to disadvantage both the candidates and the commissioners.

    - Substantively even questioning of candidates.
      This issue is closely linked to the question of timing. We have on occasions noted instances where candidates who are from similar professional backgrounds and applying for the same position, are interviewed much more or less rigorously than the other. Again, it is certainly true that the JSC must have flexibility and be able to

[3] This process has been done before. For the supplementary criteria published in 2010, see https://constitutionallyspeaking.co.za/criteria-used-by-jsc-when-considering-judicial-appointments/

respond to different issues that may be unique to certain candidates. But the effect should be that all candidates are subject to rigorous but fair scrutiny, in order to ensure that suitable appointments are made to the judiciary.

13. We observe and comment on these and other aspects of the process out of a hope that we will provide a reflection on the JSC's process that may be informative and helpful. It is never our intention to criticise for the sake of it.

14. For the April 2011 interviews, the Office of the Chief Justice provided us with some funding to assist in the production of our report. Since then, however, we have been entirely self-funded, and our work is supported by donors who recognise its importance for constitutional governance in South Africa.

15. With that background in mind, we now turn to discuss the methodology followed in compiling this report.

METHODOLOGY OF THE REPORT

16. We have experimented with various structures and approaches to compiling these reports over the years. The format currently used is intended to present a more comprehensive overview of a candidate's track record than earlier reports, which were limited to presenting simple summaries of judgments and academic articles candidates have written.

17. We do not attempted to summarise all of a candidate's judgments. To do so would make the reports far too long, and we are conscious of feedback we have received which emphasises the value of keeping the reports as concise and accessible as possible. This is never an ease task, as selecting what material to include and what to leave out is seldom and exact science. We try to select judgments and other material that seem to the researchers to provide the most useful insights into candidates' mindsets, outlook, jurisprudential approach and general attitudes and experience. E provide citations and links so that interested readers are able to follow up and read the complete judgments and articles we have sumamrised.

18. In order to make the summaries of judgments easier to navigate, we group them under the following thematic headings:
    - Private Law;
    - Commercial Law;
    - Civil and Political Rights;
    - Socio-Economic Rights;
    - Administrative Justice;
    - Constitutional and Statutory interpretation;
    - Environmental Law;
    - Labour Law;
    - Civil Procedure;
    - Criminal Justice;

- Children's' Rights
- Customary Law; and
- Administration of Justice.

19. This is the full list we utilise, and it is possible that not all categories will be used in any particular report.

20. In the course of watching JSC interviews over the years, it has become clear to us that traversing candidates' written judgments alone does not necessarily capture the full range of issues that may be canvassed with them during an interview. In order to try to give a more holistic picture of a candidate, we have begun to include media coverage of candidates, based on simple desktop research.

21. We generally do not include media reports of judgments, since these will be covered by our selection and summaries of judgments. The intention is to capture material such as speeches or interviews which may give additional insight into issues such as a candidate's personal background or mindset, which may be relevant to their suitability for judicial appointment.

22. We obviously are not able to confirm the veracity or otherwise of media reports, and as with judgments, we aim simply to present the results of the research we undertake. It is worthwhile to emphasise again that we do not include material in order to implicitly advocate for or against candidates. It is our intention to provide an overview of key aspects of a candidate's track record, which can guide members of the JSC in developing questions to ask candidates and which can assist other interested stakeholders in commenting on the suitability of particular candidates, should they wish to do so.

23. We do not provide our own analysis or criticism of the judgments summarised, but we do try to integrate academic comment on judgments into the report, where this is available. Again, we present the results of what we have found in the course of our research. A strong academic critique of a particular judgment provides an opportunity to engage on matters such as a candidate's judicial philosophy and approach to legal reasoning, but does not necessarily render a candidate unsuitable for appointment.

ACKNOWLEDGEMENTS

24. The research was conducted by Chris Oxtoby, DGRU senior researcher, and Atilla Kisla, Godknows Mudimu and Emma Schuster, DGRU research assistants.

25. We are grateful for the financial support of the Open Society Foundation and the Raith Foundation for making this project possible.

DGRU

6 SEPTEMBER 2019

MS SHEILA LUSHABA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 6 October 1969

B Iuris, Univesity of the North (1996)

LLB, University of the North (2000)

CAREER PATH

Magistrate

Head of Office, Amsterdam Magistrates' Court (February 2019 -)

Acting Magistrate (Head of Office), Amsterdam Magistrates' Court (January 2015 – January 2017)

Acting Magistrate (Additional), Emalahleni Magistrates' court (March 2014 – December 2014)

Prosecutor, National Prosecuting Authority (1998 – October 2013)

Admitted as Advocate (March 2017)

Provincial Coordinator, South African Chapter of the International Association of Women Judges

Member, Judicial Officers Association of South Africa.

MR GRAEHYMME WILLIAMS

BIOGRAPHICAL INFORMATION AND QUAIFICATIONS

Born : 8 August 1967

B Iuris, University of the Western Cape (1992)

LLB, University of the Western Cape (1994)

Certificate in Company and Commercial Law, University of the Western Cape (2018)

CAREER PATH

Acting Magistrate, Bloemfontein Magistrates' Court (February – October 2017, June 2018 -)

Attorney

GJ Williams Attorney (2002 -)

Candidate Attorney and Professional Assistant, Geduld Attorneys (1994 – 2002)

Secretary and Deputy Chairperson, African National Congress (Msb branch) (1990 – 2009)

Member and Secretary, United Democratic Front (Southern Cape) (1983 – 1990)

Chairperson, Council for the Built Environment Appeals Committee (current)

Member of Valuation Appeal Board, Department of Local Government, Western Cape (2011 – 2012)

Commissioner, Small Claims Court.

SELECTED ARTICLES

The Amazon website carries a book entitled "The Painful Ramifications of the South African Democracy" by Graehymme J Williams (Reach Publishers, 2016). The book is described as follows:

> "On certain occasions in your life, you reach a stage where you face the proverbial rubicon, and irrespective of the consequences, you have to stand bold and address issues or aspects, however uncomfortable or excruciatingly offensive it might sound to the listener or reader, but for the sake of possible resolve and honesty, you have to do it! This work is precisely that…, it is a perspective of an ordinary South African who has not only witnessed and experienced the painful effects of the apartheid system, but who has equally also witnessed the dawn of the new democracy, the euphoria of freedom and equality, and the ostensible deficiencies in the system and the ridiculous consequences. It gives an overview of various aspects in our democratic order which, should be known and of concern to the leaders of our nation, but for various reasons, and particularly because of its sensitivity, is rather disregarded or, for the sake of peace as opposed to justice, left in the "chambers of silence". The issues canvassed herein, are necessary for the enhancement of our democracy, and should be discussed with transparency. In certain instances, it requires the "stepping on the toes" of certain individuals as examples in order to clarify certain aspects which remain as yet unanswered. Many of the aspects dealt with in this work, are generally known or even thought about, but unfortunately not discussed on public platforms due to its sensitivity. It is also an attempt to vocalize the unheard cries of the silent majority. If it is the truth, it should be uttered even in the face of animosity and rejection."

[See https://www.amazon.com/Painful-Ramifications-South-African-Democracy/dp/0620735902]

ADVOCATE MARGAUX BEARD

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 18 January 1980

BSc, Rhodes University (2002)

LLB, Rhodes University (2004)

CAREER PATH

Acting Judge, Eastern Cape High Court (May – June, October – November 2016; May – June 2017; September, October – December 2018; May – June 2019)

Admitted as an advocate of the High Court (2006)

Member, Eastern Cape Society of Advocates (2006 -)

Bar Council, Eastern Cape Society of Advocates

- Member (2012 – 2014)
- Honorary Secretary (2009)
- Assistant Honorary Secretary (2008)

Temporary junior lecturer, Rhodes University (2005)

Phezula Views Home Owners' Association

- Chairperson (2018)
- Trustee (2019)

SELECTED JUDGMENTS

PRIVATE LAW

THE CONCERNED ASSOCIATION OF PARENTS & OTHERS FOR TERTIARY EDUCATION AT UNIVERSITIES V NELSON MANDELA METROPOLITAN UNIVERSITY 2016 JDR 2119 (ECG)

Case heard 17 October 2016, Judgment delivered 10 November 2016.

This was an urgent application to direct the respondent resume all academic activities and normal business operations, which had been suspended as a result of the FeesMustFall protests. Applicant sought specific performance of the first respondent's contractual obligation "to continue with its academic programme and the right to participate therein, which students of the first respondent have secured through the payment of fees." [Paragraph 11]

Beard AJ noted that, whilst the court will so far as possible give effect to a plaintiff's choice to claim specific performance, it does have a to refuse to decree specific performance. [Paragraph 13]. Beard AJ held that the order sought would "bind the first respondent in perpetuity", since it was not linked specifically to the FeesMustFall protests, and did it specify that it would operate for a limited period of time. The respondent would thus not be able to close, "even in circumstances in which the respondents were no longer able to guarantee the safety of its staff and students", and regardless of whether or not the circumstances were related to the protests. Beard AJ held that such an order would operate unreasonable harshly, or would produce injustice. Beard AJ found that this provided sufficient basis to decline to grant the order sought. [Paragraph 17].

Beard AJ held further that, even if this finding was wrong, Beard AJ held that granting the relief sought "would be to utilise a blunt instrument" to address the issue.

"Accordingly, unless the decisions taken by the respondents are unreasonable and would never result in their achieving their stated goal, namely the completion of the 2016 academic programme, I should defer to the decisions made by those with greater expertise in dealing with unfolding events and the resumption and continuation of the academic business of the first respondent. To this end I can find nothing unreasonable in the respondents' actions. …" [Paragraph 22].

Beard AJ held that it was also important that the respondents "be able to respond to a fluid situation such as the present with a degree of flexibility." Granting the relief sought would cause undue hardship to the respondents by denying them "the degree of latitude required to address an ever-changing set of circumstances." [Paragraph 23].

The application was dismissed with costs.

CIVIL PROCEDURE

NKOLA V ARGENT STEEL GROUP (PTY) LTD T/A PHOENIX STEEL (CA69/2015) [2016] ZAECGHC 115 (20 OCTOBER 2016)

Case heard 17 October 2017, Judgment delivered 20 October 2016

This was an appeal against a decision to declare the Appellant's two immovable properties executable. Appellant had defaulted on a deed of settlement entered into with the respondent, after the respondent had obtained a judgment against the appellant based on a deed of suretyship.

Beard AJ (Beshe and Lowe JJ concurring) granted applications for condonation relating to the late filing of the notice of appeal, record of appeal and heads of argument [Paragraphs 2 – 8]. On the merits of the appeal, Beard AJ set out the circumstances under which the respondent had been unable to satisfy its judgment debt against the appellant, leading to the application seeking an order declaring the appellant's properties executable. [Paragraphs 11 - 17]. Following that application, a further deed of settlement was entered into, but appellant did not make any payments in terms thereof. Instead, appellant deposed to an affidavit opposing the relief sought by the respondent, and asserting that "the respondent was not entitled to an order declaring his immoveable property executable as it had not sought to execute against his moveable property, namely shares in certain companies of which he is sole shareholder and director, these shares being of sufficient value to satisfy the judgment debt." [Paragraph 19].

Beard AJ held that the appellant had, by settling the application in which an order declaring his immovable property executable was sought, undertaken

"to make payment of the judgment debt in instalments and agreed that, should he fail to make payment of these instalments, the respondent was entitled, without further notice to him, to execute. Plainly this could only contemplate execution against the appellant's immovable property, as this was precisely the relief sought in the application. The appellant thus, by agreement, forfeited his right to claim that the respondent should have sought to execute against his moveable incorporeal property first." [Paragraph 21].

The appeal was dismissed. An appeal to the SCA was in turn dismissed in **NKOLA v ARGENT STEEL GROUP (PTY) LTD 2019 (2) SA 216 (SCA)**. The SCA held that "The full court appropriately did not interfere with the exercise of the discretion by the court of first instance", and that "[t]here is no justification for interfering with the exercise of her discretion by Jacobs AJ, as the full court rightly found." [Paragraphs 17, 19].

ADMINISTRATIVE JUSTICE

GRAY MOODLIAR INC V NELSON MANDELA BAY METROPOLITAN MUNICIPALITY AND ANOTHER (1347/2019) [2019] ZAECGHC 65 (17 JUNE 2019)

Case heard 30 May 2019, Judgment delivered 17 June 2019

The applicant was a law firm which had represented the first respondent in a variety of matters over a period of two decades. While a service level agreement (SLA) was still in operation between the parties, the applicant was notified of a decision to terminate all of its existing mandates. Applicant brought an urgent application, seeking an order reviewing and setting aside the decision. [Paragraphs 1 – 2]

Beard AJ considered two preliminary objections from the respondents, who argued that the application was not urgent, and that applicant was bound to follow an alternative dispute resolution process in terms of the SLA. On urgency, Beard AJ held that the application could not realistically have been launched any earlier than it was, [Paragraph 15] and that the implementation of the resolution had the potential to result in fruitless and wasteful expenditure [Paragraphs 16 – 18]. Beard AJ found further that the potential prejudice to the applicant's commercial interests was relevant to urgency, and that the matter could therefore be heard on an urgent basis [Paragraph 19]. On the duty to submit to alternative dispute resolution, Beard AJ found that the subject matter of the dispute was excluded from arbitration in terms of the Local Government: Municipal systems Act [Paragraphs 20 – 23].

Beard AJ then analysed the nature of the power exercised, which "lies at the heart of the issue in this application." [Paragraph 33]. After considering case law defining the difference between public and private power [Paragraphs 33 – 34], Beard AJ held that no clause in the SLA gave the respondent the contractual power to revoke instructions they had already given, and that the impugned decision did not amount "to the exercise of a private contractual right". [Paragraph 35].

Beard AJ held that the constitutional and legislative requirements placed on the municipality, as an organ of state, distinguished the process of appointing the applicant from that of an ordinary litigant appointing an attorney. The process and manner by which the SLA had been concluded, and the applicant instructed, involved the exercise of a public power, as did the decision to revoke the instructions [Paragraphs 36 – 37].

Beard AJ then turned to consider the rationality of the decision to withdraw the applicant's instructions. After noting that the standard of rationality required a cogent link between the means adopted and the goal sought to be achieved, Beard AJ examined the reasons for the termination of the applicant's mandate, and found them to have been based on a material mistake of fact; and on a "speculative and unsubstantiated allegation" relating to overcharging. [Paragraphs 53 – 55].

The decision was found to be irrational, and was set aside. The application therefore succeeded.

CRIMINAL JUSTICE

S v NTOZINI AND ANOTHER 2017 (2) SACR 448 (ECG)

Case heard 16 May 2017, Judgment delivered 19 May 2017

This was a special review. The accused had been convicted on the basis of guilty pleas of housebreaking with intent to steal, alternatively theft; and one count of trespassing. The accused had been sentenced to imprisonment of 3 and 2 years respectively. The presiding officer specifically mandated that the accused be imprisoned at Craddock prison and be enrolled in courses offered there [Paragraph 3].

The convictions were corrected due to an incorrect citation of the relevant legislation [Paragraph 10]. Beard AJ (Roberson J concurring) found that, whilst the magistrate had not mentioned section 276B(1) of the Criminal Procedure Act or contain the term 'non-parole period', the magistrate had effectively imposed a non-parole period by stating that the accused be enrolled in the skills/trade courses offered by the prison, for the duration of their sentence. [Paragraph 17]. The magistrate had not given any indication of an intention to impose a non-parole period, did not invite submissions from the parties, and exceeded the maximum non-parole period permitted. The non-parole period of the sentences therefore fell to be set aside. [Paragraphs 18 – 19].

Furthermore, Beard AJ held that:

"There is no provision in the CPA or other legislation that permits a district magistrates' court to direct where the accused person will serve out his sentence. Nor is there any statutory provision permitting such a court to order that an accused person be enrolled in skills-transfer courses whilst serving the term of his imprisonment. These functions fall exclusively within the purview of the executive. In exceeding her jurisdiction by making these orders the magistrate has fallen foul of the separation-of-powers doctrine." [Paragraph 21].

Beard AJ held that, "even trimmed of the further non-parole-period orders and those relating to the prison and manner in which the accused are to serve their sentences", the sentences were shockingly heavy. The magistrate had also misdirected herself in imposing the sentences. The sentences were accordingly reduced. [Paragraphs 25 – 31]

ADVOCATE PHILLIP ZILWA SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 17 July 1962

BIuris, University of Transkei (1985)

LLB, University of Transkei (1992)

CAREER PATH

Acting Judge

- Eastern Cape High Court ("almost annually" from 1997)
- Labour Court, Johannesburg (2008, 2010)

Advocate (1993 -)

- Appointed Senior Counsel May 2014

Transkei Government:

- State Advocate (1991 – 1992)
- Magistrate (1988 – 1991)
- Prosecutor (1985 – 1987)

Member, National Association of Democratic Lawyers (1994 -)

Executive member, Advocates for Transformation (2008 -)

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

MAKUBALO V MXUNYELWA 1998 JDR 0403 (TKH)

Judgment delivered 30 October 1997.

The only issue to be decided in this case was whether the First, Second, Third and Fourth Applicants "were the only candidates nominated in compliance with the provisions of applicable Election Regulations for the ward election in wards 1 and 2 of the Nqamakwe Transitional Local Council." [Page 3].

In the course of the proceedings, respondents sought absolution from the instance. Zilwa AJ held that this required consideration of the question of whether there was evidence "upon which a reasonable man might find for the Applicants". Zilwa AJ held that he did "not agree … that merely because the matter has been referred to oral evidence a sacrosanct finding has been made that a prima facie case has been made, debarring me from further considering that issue at this stage." [Page 8].

"In the answering affidavit the Returning Officer contends that the nomination forms of the First to Fourth Respondents were received timeously and they were appropriate just like the nominations forms of the Applicants with regard to ward elections. None of the witnesses called to give oral evidence on behalf of the Applicants have gainsaid that and Mr Ntshiqa specifically conceded tha[t] he could not say that the Returning Officer had done anything that was contrary to the Election Regulations with regard to the receipt and processing of the Respondents's ward nomination forms. Neither could he say that the Respondents's nomination forms for ward elections were not received timeously and appropriately by Fifth Respondent, the Returning Officer. … In the premises and in view of the aforesaid concessions by the Applicants's witnesses in their viva voce evidence and the numerous unsatisfactory features in their evidence … I am of the opinion that … it does not appear to me that the Applicant has made out any prima facie case … In my opinion none of the material averments that form the basis of the Applicant's case have been maintained or borne out by the Applicant's witnesses in their viva voce evidence. …" [Page 14]

And order of absolution from the instance was granted in favour of the respondents, with costs.

CHILDRENS' RIGHTS

CB v MB 2014 JDR 1356 (ECP)

The parties were divorced parents of a minor child, LB. In terms of the Deed of Settlement, the parties agreed that they would be jointly responsible for the child's care and well-being, and that due consideration to the views of the other parent would be given when making decisions that may impact on the parents' exercise of parental responsibilities and rights. The application stemmed

from a disagreement over whether the child should be enrolled in an Afrikaans or English medium school. [Paragraphs 1 – 2].

Zilwa AJ considered the parties' competing arguments, noting that they were "poles apart" from each other on what constituted the child's best interests in the matter. [Paragraph 6]. Zilwa AJ held that it was in the best interests of the child to be enrolled in an Afrikaans medium school [Paragraph 10], noting that both parties originally came from Afrikaans-speaking families, and that their mother tongue was thus Afrikaans. [Paragraph 11.1]

"The Applicant's contention that LB is part of a large family which is all Afrikaans speaking, both on his and his mother's side, and whose whole culture is Afrikaans, has not been gainsaid by the Respondent. I am of the view that his instruction in Afrikaans at this foundational stage of his education will help him to properly identify and establish his cultural identity, which aspect is essential for him even in the long term. I agree with the Applicant's submission that the language heritage aspect that is shared by both of his parents, which is Afrikaans, is important in identifying and providing a bonding characteristic which will give him a sense of belonging and security even in the long run." [Paragraph 11.4]

It was ordered that the child be enrolled in a class dedicated to Afrikaans as the medium/primary language of instruction.

CRIMINAL JUSTICE

MAGI V S (CA&R 43/11) [2013] ZAECGHC 22 (15 MARCH 2013)

Case heard 13 March 2013, Judgment delivered 15 March 2013

The appellant was sentenced to life imprisonment, having been convicted of rape in the regional court. In a separate appeal, the appellant's co-accused had seen his sentence reduced from life imprisonment to 20 years' imprisonment. The appeal court had found that, "although the rape in question was serious, as all rapes are, it could not by any stretch of imagination be described as one of the worst kinds of rape," and that "the weight of authorities is clearly that the sentence of life imprisonment for the offence of rape should only be reserved for the most serious cases." Regarding the co-accused's personal circumstances, "which are, to a large extent, similar to those of the Appellant in the present case", the sentence of life imprisonment was found to be unjust. [Paragraphs 2 – 4].

Zilwa AJ (Goosen J concurring) held:

"I am in full agreement with the learned judge's views and sentiments expressed with regard to the impropriety of the sentence imposed on the Appellants in these circumstances. As already stated the present Appellant's personal circumstances and other relevant factors are not materially different … save for an age difference of about 2 years. Indeed in argument Ms Packery, who appeared for the State, could not advance any material differences between the situation of the present Appellant and the one dealt with in Nepgen J's judgment. She merely contented herself with the submission that the life imprisonment sentence imposed by the trial Court was appropriate

because all rape is serious. I am of the view that a lengthy term of imprisonment, but not life imprisonment, is called for and it would meet the justice of the case. I see no reason to deviate from the 20 year imprisonment term that was imposed on appeal to the other person who was convicted of the same offence, which sentence I consider just and proper in these circumstances." [Paragraph 5]

The sentence was set aside, and replaced with a sentence of 20 years' imprisonment.

S V MAZOMBA 2009 JDR 0318 (ECB)

Case heard 31 March 2009, Judgment delivered 31 March 2009

The accused with charged with contravening a protection order by assaulting the complainant. The magistrate convicted the accused of assault with intent to do grievous bodily harm, and sentenced him to a fine of R3 000,00 or, in default of payment, two years imprisonment. The accused was also declared unfit to possess a firearm. [Paragraph 4].

The matter was submitted to the High Court on special review, with two issues being raised: that the essential elements of the crime of assault with intent to do grievous bodily harm were not included in the offence of contravention of a protection order with which the accused had been charged, and with regard to sentence, that the alternative of two years imprisonment was disproportionate to the amount of the fine imposed, "especially in the light of the relatively minor injuries sustained by the complainant." [Paragraph 5].

Zilwa AJ (Dhlodhlo ADJP concurring) held that that Magistrate had indeed erred in convicting the accused of assault:

"The presiding Magistrate seems to concede that his finding that the protection order was invalid only by virtue of the fact that it had not been served on the accused person by a police officer, was incorrect. Such concession is well founded in our view. ... In the circumstances the Magistrate's finding of the invalidity of the protection order on that score only, is without basis. ... Since one of the elements that would need to be proved by the state to secure a conviction for such contravention is intent on the part of the accused person, it would be incumbent upon the State to prove that the accused person had intentionally violated the provisions of the protection order after it had been duly and properly served on him and he had been properly advised of, or had become aware of the provisions thereof. ..." [Paragraphs 8 – 9]

Zilwa AJ held that the State had failed to prove that the accused "had intentionally and knowingly violated or contravened a protection order as he was charged", and therefore that he could not be convicted of that offence. [Paragraph 11]. However, in light of "compelling evidence that the accused did assault the complainant on the day in question", Zilwa AJ held that the accused should have been convicted of common assault. With regard to sentence, a fine of R3 000 with an alternative prison sentence of six months was imposed. The conviction and sentence were set aside and substituted accordingly.

ADVOCATE AMELIA DA SILVA

BIOGRAPHICAL INFORMATION AND QUAIFICATIONS

Born: 25 June 1974.

BA, University of Natal, Durban (1996)

LLB, University of Natal, Durban (1999)

CAREER PATH

Chairperson, SARS Tax Board (2019 -)

Acting Judge, Eastern Cape High Court (2009, July – August 2010, October – November 2011, July – August 2017, July – September 2018).

Advocate (2005 -)

Potelwa & Co

Professional Assistant (2000 – 2003)

Candidate Attorney (1998 – 2000)

Member, Transkei Society of Advocates (2005 -)

Member, Bhisho Society of Advocates (2008 -)

Member, National Association of Democratic Lawyers (2015 -)

SELECTED JUDGMENTS

CRIMINAL JUSTICE

TITUS & ANOTHER V S [2010] JOL 26289

Case heard 18 August 2010, Judgment delivered 27 August 2010

Appellants were convicted of robbery with aggravating circumstances, and sentenced to eight years' imprisonment. They appealed against conviction and sentence, on the grounds that the trial court had "erred in not "*properly*" applying the cautionary rule and in rejecting, as not being reasonably possibly true, the appellants' version that the complainant had falsely implicated them." [Paragraph 2].

Da Silva AJ (Chetty J concurring) held that, considering the evidence as a whole, the magistrate had not misdirected herself:

"It is evident from the judgment that the magistrate applied the cautionary rule when evaluating the evidence of the complainant. She satisfied herself that the complainant properly identified the persons who robbed him of his cellular phone. In fact, it was common cause that the complainant and appellants knew each other and that the incident took place in a well lit road." [Paragraphs 8 – 9]

Da Silva AJ further found a "material contradiction" in the evidence of the appellants. [Paragraphs 11 – 13]. The appeal against both conviction and sentence was dismissed.

AFRIKAANER V S [2010] JOL 26288

Case heard 18 August 2010, Judgment delivered 26 August 2010.

The accused was convicted on two counts of receiving stolen goods, and sentenced to three years' imprisonment, half of which was suspended for five years. The appellant had pleaded guilty, and the appeal was thus against sentence only.

Da Silva AJ (Beshe J concurring) held:

"The judgement shows that the magistrate in sentencing the appellants considered the personal circumstances of the appellant, namely his age, his state of employment and the fact that he had dependants. The appellant's personal circumstances were weighed up against the interests of society, the fact that the appellant had three previous convictions, namely of stock theft and theft, the number of times he had received goods knowing to be stolen and the fact that it did not appear that the appellant would rehabilitate without imprisonment." [Paragraph 6].

"Regard being had to the cumulative effect of the factors referred to above, sentence of three years imprisonment, half of which has been suspended, is in my view entirely appropriate. … I agree …

that even if the trial court had misdirected itself in finding that the appellant was trading in stolen goods, the sentence imposed was in line with comparable cases. …" [Paragraphs 8 – 9]

The appeal was dismissed.

ADVOCATE SUNIL RUGUNANAN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 2 July 1966

BA, Legal Theory and Industrial Sociology, Rhodes University (1990)

LLB, Rhodes University (1993)

CAREER PATH

Acting Judge, Eastern Cape High Court, Grahamstown (May 2014, July 2016 – September 2016, March, April – July, July – September 2019)

Commissioner, Small Claims Court (2007 –)

General Secretary, Eastern Cape Society of Advocates (2003 - 2004)

Advocate, Grahamstown Bar (2001 –)

Commissioner, Eastern Cape Tax Board (2008)

Estates Examiner, Department of Justice Master's Division (1998 – 2001)

Candidate Attorney and Professional Assistant, NN Dullabh & Co (1995 – 1998)

Candidate Attorney, B. Sandi & Co (1993 – 1995)

Member, Legal Practice Council, Eastern Cape (2019 -)

Member, NADEL (1993 – 1998, 2016 -)

Member, Advocates for Transformation (2003 -)

Member, Grahamstown Bar (2001 -)

SELECTED JUDGMENTS

PRIVATE LAW

EASTERN CAPE MOTORS (PTY) LTD V STU DAVIDSON AND SONS (PTY) LTD [2016] ZAECGHC 109 (25 OCTOBER 2016)

Case heard 29 July 2016, Judgment decided 25 October 2016

This was an appeal against the dismissal of the appellant's claim for damages against the respondent. The claim was based on a breach of a warranty contained in a written agreement, alternatively a claim formulated in delict arising from an alleged negligent misrepresentation, relating to the trade-in of a vehicle previously involved in an accident.

Rugunanan AJ (Pickering J concurring) held:

"Respectfully, the magistrate erred in concluding that the representation constituted only an opinion on the condition of the vehicle and that by implication it was not an enforceable term of the parties' agreement. The issue to be decided on appeal must accordingly be approached on the footing that clause 7 encapsulates a warranty, the breach of which will depend on whether the Transporter was involved in a "*substantial / major accident"* affecting its resale value. …" [Paragraph 11]

"I am of the view that the evidence … establishes that the Transporter was involved in "*a substantial / major accident".* The consequence is that the appellant has proven a breach of the warranty contained in clause 7 of the *trade-in declaration*. …" [Paragraph 24]

The appeal was upheld.

CRIMINAL JUSTICE

S V MQUQU 2019 (2) SACR 207 (ECG)

Case heard 9 May 2019, Judgment delivered 14 May 2019

Appellant challenged the denial of bail, for the second time following an early, unsuccessful, challenge.

Rugunanan AJ noted that the appeal proceeded on the assumption that the offences with which the appellant was charged fell under schedule 6 of the Criminal Procedure Act [Paragraph 5]. Rugunanan AJ held further that:

"[T]he court is obliged to consider, inter alia, an applicant's state of health, the period already spent in custody since arrest, as well as financial loss suffered as a result of detention. To the extent that no consideration was given to these aspects of the evidence where they revealed that none of the likelihoods in s 60(4) of the Act were extant, the magistrate's judgment does not account for all the evidence and is indicative that he misdirected himself and arrived at the wrong conclusion. As for the extensive delays in finalising the prosecution of the trial, it was inappropriate for the magistrate to have found that the appellant could not rely on this ground ... A delay in the finalisation of a prosecution can constitute an exceptional circumstance. The history of this matter renders it likely that further delays may ensue. Undoubtedly, this will have a profound impact on the appellant's personal and economic circumstances if he were to endure continued detention." [Paragraph 16]

"When bail was refused in December 2014 and on appeal to this court in December 2018, the proverbial scales were tipped against the appellant due to, inter alia, the fact that he had three cases pending against him and warrants were supposedly issued for his arrest. Once the cases were withdrawn against the appellant and none of the warrants executed, the cumulative impact of the new facts, in particular his state of health, the length of time spent in custody while awaiting trial and its consequent negative impact on his financial standing, tipped the scales in his favour and rendered his circumstances exceptional to the extent that his release on bail should be permitted in the interests of justice." [Paragraph 17]

The appeal succeeded, and bail was granted.

S v KOESTER [2016] ZAECGHC 60 / 61 (10 AUGUST 2016)

Case heard 1, 2 and 4 August 2016, Judgment delivered 10 August 2016

The accused was convicted of murder. This judgment dealt with sentencing.

Rugunanan AJ held:

"Having considered the matter anxiously, I am of the view that, in the circumstances of this matter, a heavy sentence in excess of the prescribed minimum is justified. The accused committed a brutal and callous act for no justifiable reason and for which no explanation exists other than a blatant denial premised on the notion of a conspiracy against him. This kind of brutality has unfortunately become a regular occurrence of life in South Africa and courts are enjoined to signal a clear message that such behaviour will not escape the full force and effect of the law .... It is noted the accused elected not to testify in mitigation of sentence. Whatever his reasons, that was his right but it is not without consequences ... His silence simply meant there was nothing to be said in his favour." [Paragraph 17]

"Accordingly, a sentence of 18 years' direct imprisonment is one that I consider proportionate to the nature and seriousness of the crime and which takes due cognisance of the Legislature's desire to impose a firm punishment, the circumstances of the accused and the interests of society." [Paragraph 18]

S V NOJOKO 2016 JDR 1908 (ECG)

Case heard 27 July 2016, Judgment delivered 17 October 2016

This was an appeal against conviction and sentence, the appellant having been convicted in the regional court on charges of rape, kidnapping and assault with intent to commit grievous bodily harm.

Rugunanan AJ (Lowe J concurring) held:

"... [T]he evidence on record reveals that the assaults on the complainant, her enforced deprivation of freedom and repeated rapes were tormenting, callous and perpetrated with a flagrant disregard for the sanctity of her physical and mental integrity. A society striving towards the ideals of equality and dignity does not sit back and adopt a passive and indulgent approach to crimes of violence against women. This kind of brutality has unfortunately become a regular occurrence of life in South Africa and courts are enjoined to signal a clear message that such behaviour will not escape the full force and effect of the law ..." [Paragraph 24]

The appeal was dismissed.

TROSKIE V *S* [2016] ZAECGHC 53 (27 JULY 2016)

Case heard 27 July 2016, Judgment delivered 27 July 2016

An appeal against a sentence of three years direct imprisonment for fraud.

Rugunanan AJ held:

"Although nothing is known of her personal circumstances during the aforementioned period nor of the origins of her fraudulent conduct, the appellant contritely acknowledged that she 'did not make the right decisions'. It is considered appropriate to mention at this point that the plea of guilty discloses that the appellant committed the offence of fraud for personal gain. Whether this can be attributed to greed or need, is uncertain. During her evidence in mitigation she also disclosed that the amount of money involved has never been repaid to the complainant. This emerged under cross-examination. While incarcerated it is also evident that she has persevered in becoming a responsible member of society. She attended several rehabilitation programs conducive to character development and decision making and is currently, through sponsorship assistance, studying towards a bachelor's degree in ministry. Seemingly

influenced by these programs, she pleaded guilty to the present charge and expressed remorse for her wrongdoing. In this regard her potential for rehabilitation was either completely overlooked or received insufficient consideration by the magistrate and was in fact under-emphasised. By emphasising the impact of a sentence on potential offenders without attaching sufficient weight to her potential for rehabilitation, the approach adopted by the magistrate points to the sacrifice of the appellant on the altar of deterrence." [Paragraph 8]

"Respectfully, the result achieved does not lend itself to a conclusion that there was a proper and reasonable exercise of discretion by the magistrate upon imposing sentence. ..." [Paragraph 9]

The sentence was reduced to two years' imprisonment, antedated.

VAN BREDA V S [2014] ZAECGHC 42 (4 JUNE 2014)

Case heard 14 May 2014, Judgment decided 4 June 2014

The appellant was convicted in the magistrates' court on a charge of fraud and sentenced to a fine of R1 000,00 or 60 days' imprisonment, conditionally suspended for 5 years. This was an appeal against conviction.

Rugunanan AJ (Eksteen J concurring) held:

"The reasoning employed by the magistrate shows that he did exactly what is cautioned against in the dicta cited from the aforegoing judgments. His line of reasoning, apart from disclosing no good reason for rejecting the appellant's version, evidences a selective and piecemeal process of reasoning which overlooks consideration of a crucial ingredient, namely whether the reasonable possibility remains that the appellant's explanation may be true. Clearly, the appellant's version is not so improbable as to be rejected out of hand" [Paragraph 23]

"... I consider that the magistrate erred in holding that the State succeeded in discharging the onus on the main issue and therefore in proving the appellant's guilt beyond reasonable doubt." [Paragraph 24]

"The appeal is accordingly allowed and the appellant's conviction and sentence is set aside." [Paragraph 25]

ADVOCATE NYAMEKO GQAMANA SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 12 February 1973.

B Iuris, Vista University (1993)

LLB, Vista University (1996)

Higher Diploma in Labour Law, University of Port Elizabeth (1999)

LLM (Labour Law), University of Port Elizabeth (2000)

CAREER PATH

Acting Judge, Eastern Cape High Court (October – December 2012; January – March, September – November 2013; February – March 2014; November – December 2016; May – June, June – July 2017; July – August 2018)

Advocate (1998 -)

Appointed senior counsel (2014)

Part-time senior arbitrator, South African Local Government Bargaining Council (2001 – 2012)

Arbitrator, Arbitration Foundation of South Africa (2000 -)

Part-time commissioner, CCMA (2000 – 2012)

NADEL

Branch chairperson, Port Elizabeth & districts (2003 – 2006)

Member (1998 -)

Advocates for Transformation

Chairperson (2006 – 2008)

Member (2000 -)

Member, Eastern Cape Society of Advocates (1998 -)

Member, African National Congress (1991 – 1998), ANCYL (1990 – 1995)

SELECTED JUDGMENTS

PRIVATE LAW

CLEMLEN INVESTMENTS NO. 10 (PTY) LTD V RECYCLE YOURSELF (PTY) LTD (1328/2017) [2017] ZAECPEHC 32 (13 JUNE 2017)

Case heard 25 May 2017, Judgment delivered 13 June 2017

Applicant sought an order directing respondent to comply with contractual obligations arising from a lease agreement between the parties. Respondent had leased property for the purposes of recycling paper and cardboard products. In terms of the lease, the front yard area of the warehouse could be utilised for staff and visitor parking and loading and off-loading of trucks only. All stock in trade was required to be worked with and stored internally, with the external yard remaining clean and tidy at all times. There was furthermore a prohibition on purchasing cardboard or paper products from "people … off the street". Applicant argued that respondent was in breach of these provisions, in that respondent had "on several occasions stored, *inter alia*, large metal bins, shipping containers, bales of recyclable material and baling machines in the yard area in front of the premises." [Paragraphs 4 – 5]. Respondent disputed that its conduct was in contravention of the lease [Paragraph 10].

Gqamana AJ held:

"… It is evident from these annexures that shipping containers, recyclable materials and bales are stored on the outside of the warehouse. These are huge shipping containers and there is no evidence that they were there for purposes of loading and off-loading when these photographs were taken. Huge number of shipping containers with recyclable bags next to them are clearly visible from the photographs. Therefore, the respondent's contention that it has not conducted its business in contravention of clause 29 of the lease agreement is paralysed, having regard to all the evidence produced by the applicant." [Paragraph 11]

Gqamana AJ then rejected an argument that an alternative remedy was available to the applicant, as the applicant was "entitled to enforce the respondent not to act contrary to the terms of the lease agreement." [Paragraph 13] Gqamana AJ held that the applicant had met the requirements for an interdict, and the application was granted.

SLAMDIEL V MINISTER OF POLICE NO 2015 JDR 1501 (ECP)

Case heard 8 – 9 December 2014, Judgment delivered 7 April 2015.

Plaintiff sued defendant for damages, alleging that he had been shot and assaulted by unidentified members of the Police. Defendant pleaded a complete denial. [Paragraphs 1 – 2].

Gqamana AJ held:

"… Plaintiff and his witness identified the assailants as being police because they were wearing the police grey/blue uniform. Although there were slight discrepancies between plaintiff and his witness

on the colour of the uniform but in my view such discrepancy was not of any significance. ... The submission by defendant's Counsel that it could have been the "Metro Police" that shot the plaintiff is with respect not supported by any evidence. There is only one version before me, i.e. the plaintiff's version. Both plaintiff and Ms Krammers made favourable impressions upon me and were generally good witnesses. They were entirely honest witnesses and had no intention of colluding with each other on their version of events. ..." [Paragraph 8].

"A strikingly disturbing aspect in this matter is that, plaintiff was shot and assaulted without having provoked the police. His attempt to take cover by running away resulted in him having been shot from behind. The same police undeterred by the fact that plaintiff was injured, continued to assault him even though he committed no wrong. I must express my view that those police members that were involved in this incident are an embarrassment to the police profession. It is so unfortunate that their names could not be identified, otherwise I would not have hesitated in asking for the Registrar of this Court to forward this judgment to the Provincial Commissioner and National Commissioner for disciplinary actions against those police members." [Paragraph 10].

Defendant was held to be liable to the plaintiff for damages to be proved.

CIVIL PROCEDURE

MOHALE V MINISTER OF SAFETY AND SECURITY (1367/09) [2016] ZAECPEHC 76 (13 DECEMBER 2016)

Case heard 1 December 2016, Judgment delivered 13 December 2013

This was an application for condonation of a failure by the applicant to serve a notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act on the respondent. In the main action, applicant sought damages for damages arising from an alleged assault, unlawful arrest and unlawful custody.

Gqamana AJ noted that the applicant had been represented by two different attorneys, but had not brought an application for condonation of the failure to serve the required notice [Paragraph 6]. Gqamana AJ considered the possible grounds for condonation, and held:

"The explanation given by the applicant for his failure, is lacking and insufficient. With all my attempts to assist the applicant, but I just cannot find an explanation for his failure to give the notice. Even after his non-compliance was drawn to his attention by the respondent in his plea no action was taken to remedy same. In fact, except for Mr O'Brien's affidavit that the applicant refused to sign the condonation application, there is just no explanation." [Paragraph 9].

"On facts and evidence before me the explanation given for failing to give such notice is lacking and insufficient. In addition to this even the explanation for the delay in bringing the condonation application suffers the same fate. No other person except the applicant can be blamed for the delay. The *bona fides* of the applicant is questionable." [Paragraph 12].

The application for condonation was dismissed with costs.

CRIMINAL JUSTICE

ODENDAAL V S [2017] JOL 38889 (ECG)

Case heard 16 November 2016, Judgment delivered 9 December 2016

This was an appeal against sentence. The appellant had been convicted of theft and sentenced to ten years' imprisonment. Appellant had been employed by a major bank, and had stolen two amounts of over R500 000 each. [Paragraphs 2 – 4]

Gqamana AJ (Roberson J concurring) noted that the appellant argued that the sentence imposed by the trial court is shockingly inappropriate, having regard to the appellant's age, and the fact that she pleaded guilty and offered to reimburse the complainant. Appellant argued further that the trial court had misdirected itself by not suspending a portion of the sentence. [Paragraph 5]. Gqamana AJ held that:

"I am not persuaded that the trial court misdirected itself and/or that the sentence imposed is shockingly inappropriate. The gravity of the offence of which the appellant was convicted calls for a severe sentence. If one weighs the appellant's personal circumstances against the nature of the offence relevant hereto, her systematic scheme and the manner in which she committed the offence relevant hereto, the inescapable conclusion is that, the seriousness of the offence and interests of society far outweigh the appellant's personal circumstances. As a matter of fact, the appellant was a senior bank officer, she was in a position of trust towards the community, her employer, as well as her colleagues and she, abused it. She had the opportunity to reflect on her conduct, but instead, she persisted with her systematic scheme which she commenced within Ventersdorp and continued unrepentant with it even after her transfer to Joubertina. She did not report her conduct herself but she was caught." [Paragraph 9].

Gqamana AJ held that he sentence imposed was appropriate, and there was no basis for interfering with the decision. The appeal was dismissed.

JUDGE BULELWA PAKATI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 18 March 1961

Diploma Juris, University of Transkei (1986)

BJuris, University of Transkei (1988)

LLB, University of Transkei (1990)

CAREER PATH

Judge, Northern Cape High Court (2012 -)

Regional Magistrate (2004 – 2012)

Senior Magistrate (2002 – 2004)

Magistrate, Head of Office, Maclear (2000 – 2002)

Magistrate (1991 – 2000)

Member and Provincial Co-coordinator, Northern Cape, SAIAWJ (2012 -)

Member, SAWLA (2011)

Member, ARMSA (2004 – 2010)

Member, JOASA (2003 – 2007)

Member, BLA (1990 – 1991)

Member of school governing body : St Cyprian's Gramamr School (2015 -) and Kwaggasrand High School (2007)

SELECTED JUDGMENTS

PRIVATE LAW

MALAN V MINISTER OF DEFENCE (691/2011) [2014] ZANCHC 10 (5 SEPTEMBER 2014)

Case heard 13 May 2014, Judgment delivered 5 September 2014

Plaintiff, a Warrant Officer in the Human Resources division of the SANDF, sued for damages following his arrest and detention by the Military Police. It was alleged that during the course of his detention, plaintiff was assaulted, and insulted by a senior SANDF officer. During the course of the trial the unlawfulness of the arrest and detention was conceded by the defendant.

Pakati J held:

> "... [I]t is clear that Gen Mpaxa was aware that she was violating the plaintiff's right to privacy. She later admitted that she was fully aware of the doctor-patient privilege and conceded that she should have respected it. ... The mere entrance by Gen Mpaxa and Maj Kgokong in the examination room as described and conceded to, was unlawful and constituted an infringement of the plaintiff's right to privacy and impugned his dignity. ..." [Paragraphs 31 - 32]
>
> "The mere entrance by Gen Mpaxa and Maj Kgokong in the examination room as described and conceded to, was unlawful and constituted an infringement of the plaintiff's right to privacy and impugned his dignity." [Paragraph 41]

The plaintiff's claim succeeded.

MEREMENTSI V VISSER (CA&R 3/2011) [2013] ZANCHC 9 (26 MARCH 2013)

Case heard: 21 November 2011 and 11 February 2013; Judgment delivered 26 March 2013.

Appellant sued the respondent for damages for failing to sign transfer documents to transfer immovable property to the appellant. Respondent admitted not signing the documents, but claimed not to be at fault. The magistrate at first instance found for the respondent.

Pakati J held:

> "... [I]t is clear that the magistrate was, unfortunately, out of her depth. She failed to focus on the law, both statutory and the common law principles. She did not consider the fact that the alleged subsequent oral and unilateral attempt to change a valid written agreement offends against the parol evidence rule. The magistrate lost sight of the fact that a matter admitted by a party need not be proved by the opponent. The judgment is also full of contradictions." [Paragraph 23]
>
> "The Magistrate further misdirected herself when she found that the plaintiff led hearsay evidence to prove that the defendant defaulted in signing the documentation to effect transfer. It is a rule of evidence that no evidence need be adduced to prove an admitted fact. The defendant ... admitted in his plea that he failed or refused to sign the transfer documentation. At that stage the purchase price had already been paid by the plaintiff, which means that the

plaintiff complied with all the terms of the agreement. The defendant also could not change the purchase price unilaterally." [Paragraph 29]

"The court a quo further committed a misdirection in having stated that the plaintiff failed to comply with the terms of the agreement in that he paid the R16 000-00 to the defendant's "guardian" instead of the municipality. The place where and to whom the purchase price was to be paid is not an essentialia of a contract of sale of immovable property. …" [Paragraph 30]

"… [T]he defendant breached the contract by not signing the transfer documents and the plaintiff was impoverished as he had to buy the property at a price much higher than the agreed price. Had the defendant performed in terms of the contract no enrichment problem would have arisen. The defendant's enrichment was at the plaintiff's expense. It must be borne in mind that the property fetched the higher price because of the improvements that the plaintiff had effected. He therefore paid twice for the improvements and was therefore impoverished. …" [Paragraph 35]

Williams J dissented, finding that the plaintiff had failed to prove damages, and that as the claim had not been based on enrichment, all references to enrichment in the main judgment were erroneous. Kgomo JP wrote a separate judgment concurring in the judgment of Pakati J. The appeal was upheld.

COMMERCIAL LAW

DU TOIT V ROODT AND OTHERS (458/2011) [2011] ZANCHC 32 (11 NOVEMBER 2011)

Case heard 12 August 2011, Judgment delivered 11 November 2011

Applicant and first respondent were directors of the second respondent (Saamwerk Soutwerke Ltd). First respondent owned 12% of the shares in Saamwerk, and held a 26% interest in the third respondent, Kalkpoort CC. Applicant was the majority shareholder in Saamwerk, and a majority member in Kalkpoort. An association agreement was entered into between applicant and first respondent, but their relationship soured.

On the return day of a *rule nisi*, Pakati AJ held:

"In his answering affidavit Roodt failed to respond to material allegations made by Du Toit … A respondent's answering affidavit is required to deal pertinently with the allegations contained in an applicant's founding affidavit. If a respondent fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit the Court will, for the purposes of the application, accept the applicant's allegations as correct. …" [Paragraph 19]

"Both Du Toit and Roodt, as directors of the company, have to exercise their powers and carry out their duties *bona fide* and for the benefit of the company. Apart from the duties imposed on a director in terms of the Act, 61 of 1973 (now repealed by Act 71 of 2008), a director is at common law subject to fiduciary duty requiring him to exercise his powers *bona fide* and for the benefit of the company and to display reasonable skill in carrying out his office. …"

Pakati J held that the "overwhelming evidence" was that Roodt was "busy destroying the good name and reputation of Saamwerk Ltd and Kalkpoort CC", and that he had breached his duty as a director. He had shown now interest in the prosperity of Saamwrk or Kalkpoort [Paragraphs 21, 23]

> "Roodt acted in bad faith by consulting outsiders and soliciting their help to prejudice the businesses in their good name and goodwill. Roodt has essentially made bare denials. I am satisfied that the applicant ... has established a proper case for a final interdict." [Paragraph 25]

CRIMINAL JUSTICE

S V LITSILI (K/S 6/11) [2011] ZANCHC 33 (17 NOVEMBER 2011)

The accused with charged with one count of murder, one count of rape alternatively sexual acts with a corpse, and one count of theft. The victim was the mother of the accused.

Pakati AJ noted that it was common cause that the deceased had been murdered. The issue to be determined was the identity of the perpetrator [Paragraph 25].

"The accused could not explain how deceased's blood landed on his shoes and the blue jeans he wore ... He could also not explain his shoe print similar on the blood-soaked or liquid-smeared bedroom floor. He said that when he left his shoes they were clean. This implies that someone wore his shoes and his blue jeans, killed his mother, raped her and walked around the house. He stated that it was possible that the perpetrator spilt blood on his clothing and shoes to set him up. The accused's explanation is not only false but it is also laughable." [Paragraph 30]

"I am satisfied that the perpetrator who killed and had sexual intercourse with the deceased is the accused. This explains how the deceased's blood came onto his blue jeans and shoes. The accused was unable to give an acceptable explanation ..." [Paragraph 37]

"Notably large amount of force was used ... The severity of the head injuries sustained by the deceased was to the extent that the deceased could not have survived because of blood found in the airspaces. It is not possible that the accused left the deceased alive as he wants the court to believe. What is clear is that the accused continued to assault the deceased after her heart had stopped beating. This is evident from the medical evidence ... The sexual act was also committed post mortem. The deceased was an elderly woman of 61 years and defenceless. The accused wanted this court to believe that she was armed with a spade when he disarmed her ...the assault on her was vicious and gruesome resulting in injuries ... which led to her death. ..." [Paragraph 40]

"The manner in which the deceased met her demise with specific reference to the injuries found during the post-mortem examination and her cause of death, satisfy me that the only reasonable inference that can be drawn is that the accused assaulted the deceased with the direct intention to kill her." [Paragraph 41]

KHAULI & ANOTHER V S [2011] JOL 26779 (GNP)

Judgment delivered: 10 December 2010

Appellant and another accused had been convicted of robbery and murder and sentenced to 15 years and life imprisonment in respect of each count. Immediately after sentence, on 30 August 2002, an application for leave to appeal was dismissed by the trial judge.

Pakati AJ (Webster and Ranchod JJ concurring) held:

> "On 5 February, 2007, the appellant brought another application for leave to appeal before Shongwe DJP (as he then was). Leave to appeal was only granted on sentence." [Paragraph 3]
>
> "The question is whether Shongwe DJP was competent to entertain the appellant's second application after leave had been refused by the trial court against both conviction and sentence." [Paragraph 4]
>
> "... The application for leave to appeal entertained by Shongwe AJA (sic) was clearly contrary to the express provisions of [Section 316(8)(a)(ii) of the Criminal Procedure Act]. It was improperly before him as he had no power, with respect, to entertain it. ..." [Paragraph 5]
>
> "It is clear that Shongwe DJP was not made aware that the appellant had already exhausted his appeal remedies in the High Court. The application was not supposed to have been entertained because the High Court was *officio*. The appellant's remedy was to seek leave to appeal from the President of the Supreme Court of Appeal by way of petition. This Court, sitting as a court of appeal, may therefore not entertain the appeal. ..." [Paragraph 6]
>
> "In my view, there is no appeal before us to uphold or dismiss. In my view, the proper order is to strike the matter from the roll." [Paragraph 8]

MEDIA COVERAGE

Recounted difficulties with colleagues during a previous JSC interview:

> "A bad experience on the issue of Afrikaans was recounted by another candidate for judicial appointment. She told the JSC she felt she had not been welcome when she had acted as a judge in the Northern Cape High Court, because she did not speak Afrikaans ... Magistrate Bulelwa Pakati, being interviewed for the North Gauteng High Court, said that when she arrived at the Northern Cape court, a colleague had said to her that she would 'not make it in the Northern Cape' if she did not understand Afrikaans. Later, she sat in an appeal with the same colleague. According to Pakati, the judge wrote a judgment in Afrikaans and said to her. 'Take this judgment. It's written in Afrikaans. Go and struggle with your dictionary and see whether you concur or not.' She said when Judge President Fran[s] Kgomo went on long leave, that 'was a period that was worse for me. Because I felt that the other judges were not collegial to me.'"

- Legalbrief, no date given, available at http://legalbrief.co.za/diary/legalbrief-today/story/why-theres-no-rush-for-posts-on-johannesburg-bench/print/

Article describing "startling revelations" in October 2017 interview for the position of Northern Cape DJP:

> "[Former Judge President] Kgomo, who had sat on the commission until his retirement, had written to the JSC regarding Pakati's candidature.
>
> In that letter he went into detail about Pakati's shortcomings, describing her as someone who "can be very moody and aloof" and who has been "shown to make elementary but far-reaching mistakes" in her judgments.
>
> Pakati said she was "shocked" by Kgomo's letter since the allegations were untrue.
>
> She said she had always considered herself to have a good relationship with her former boss – and that he was her "mentor". ...
>
> Later, as commissioners ... interrogated Pakati on the possible motivation behind Kgomo's letter, she revealed the severe divisions within the Northern Cape High Court — which, she said, appeared to be of Kgomo's making.
>
> Pakati said she had not applied for the deputy judge president position earlier this year because Kgomo had indicated he "had hunted" Phatshoane.
>
> "I did not apply in April because I knew that JP [Kgomo] said this is the person he wanted, so I knew it was useless," said Pakati."

- Niren Tolsi, "The dark world of judicial politics", *City Press* 8 October 2017 (https://www.news24.com/SouthAfrica/News/the-dark-world-of-judicial-politics-20171008-2)

MS NOKUTHULA DANISO

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 6 January 1974.

BProc, University of Limpopo (1996)

LLB, UNISA (2012)

CAREER PATH

Acting Judge, Free State High Court (October 2017, September, October, December 2018)

Magistrate

Senior Magistrate (2017 -)

Acting Regional Magistrate (2017)

Magistrate (2004 – 2017)

Acting District Magistrate (2003 – 2004)

Attorney (sole practitioner), Moyana Attorneys (1999 – 2003)

Professional Assistant, Keith Motshegoa Attorneys (1999)

Candidate Attorney, Pretorius Osborne Attorneys (1997 – 1999)

Clerk, Pretorius Osborne Attorneys (1993 – 1996)

Board member, Council for Debt Collectors (2018 -)

Member, South African Chapter of the International Association of Women Judges (2017 -)

Member, Law Society of the Northern Provinces (!997 – 2003)

Rhema Bible Church (2012 -)

SELECTED JUDGMENTS

PRIVATE LAW

SCHEEPER V MASTER OF THE HIGH COURT, FREE STATE AND OTHERS (1173/2018) [2018] ZAFSHC 181 (16 NOVEMBER 2018)

Case heard 20 September 2018, Judgment delivered 16 November 2018.

This case involved a dispute between siblings over a jointly inherited property. There was a cash shortfall on the property, and the siblings were unable to agree on how to settle the shortfall. As a result, the executrix (second respondent) decided to sell the property to offset the shortfall. The heirs were given first option to purchase the property, but only the fourth respondent made an offer. The second respondent then lodged a liquidation and distribution account providing for the sale of the property to the fourth respondent. Applicant and third respondent filed an objection to the L&D account, which was dismissed by the Master. This application sought to have that decision set aside. [Paragraphs 1 – 7].

Daniso AJ held that it was trite law that unless the will provided otherwise, the executrix was permitted to sell the property of the estate. Such a sale had to be subject to conditions approved by the heirs in writing, alternatively, by the Master. In this instance, the sale had been approved by the Master after the fourth respondent made the offer to purchase. [Paragraph 16].

Daniso AJ then considered an argument that it was not within the powers of the executrix to accept an offer below the value of the property:

"… [T]he only offer presented to the second respondent was from the fourth respondent, the applicant and the third respondent refused to participate in the sale negotiations, in fact the applicant even stated that he was not willing to purchase a property he was meant to inherit. The second respondent was therefore left with no option but to accept an offer that was less than the appraised value as it was the only offer that was forthcoming and she was also advised by the valuators that it will take time and it will also be difficult to get the value in an open market." [Paragraph 17].

The application was dismissed with costs.

CIVIL PROCEDURE

DE WET V JACOBS 2019 JDR 0213 (FB)

Case heard 22 November 2018, Judgment delivered 13 December 2018

This judgment dealt with the costs flowing from an urgent application brought by the applicants to have Ms De Wet (the patient) live with them or be placed in an old age home. The parties ultimately took an order by agreement, in terms of which the patient was declared to be of unsound mind and thus incapable of managing her affairs. The order made provision for the appointment of a curator *personae* for the patient. [Paragraphs 1 – 10].

Daniso AJ considered the arguments advanced by both parties, and held that:

"… There were no exigent reasons for the applicants to launch these proceedings in the high court and on an urgent basis for that matter. … The application was irate [sic]. Serious allegations were levelled against the respondents in the applicants' affidavit. The respondents were entitled to come to court and respond to those allegations." [Paragraphs 16 – 17].

"The applicants clearly conducted themselves in a vexatious manner. I However do not think that their conduct is so reprehensible to warrant a punitive cost order." [Paragraph 18].

The applicants were held liable for the respondents' costs on a party-party scale.

JONKER AND OTHERS V LAMBONS (PTY) LTD AND ANOTHER (2769/2017) [2018] ZAFSHC 186 (8 NOVEMBER 2018)

Case heard 13 September 2018, Judgment delivered 8 November 2018.

This was a review of a taxation of costs. Applicants' attorney, an admitted attorney with right of appearance "enrolled in the Gauteng Division", was not permitted to appear, on the grounds that only attorneys whose names were on the roll of attorneys for the Free State division were allowed to represent a party at taxation. The taxation was consequently postponed, and the applicants sought to review that ruling. [Paragraphs 1 – 3].

Daniso AJ rejected various interlocutory points, and held that the practice directives relied on by the respondent did not provide "that only attorneys whose names appear on this division's roll of attorneys may appear at the taxation." [Paragraph 17].

"… [S]ection 4(4) of the [Right of Appearance in Courts] Act specifically grants the attorney who has been issued with a certificate of right appearance … a right to appear in all the divisions of the high court to discharge all other functions of an advocate in ***any proceedings*** (my emphasis) in those divisions. In my view, "any proceedings" include appearing before a taxing master for taxation." [Paragraph 19].

Daniso AJ concluded that the taxing master had "misconceived the facts and the circumstances as to the practice of this court", and that the ruling was clearly wrong. [Paragraph 20]. It was further held that:

"It was common cause that the taxation which is subject to this application is the second taxation involving the same parties. The first taxation was set down on 15 February 2018. The applicants were not satisfied with the taxing master's rulings and launched a review application. The taxing master's actions in bargaining with van Deventer that she could represent the applicants in the taxation provided she agrees to waive the right to review the rulings made at the taxation are quiet disturbing and cast doubt to her impartiality. A taxing master performs a function of a judicial nature, her independence and impartiality must be beyond reproach." [Paragraph 22].

The ruling of the taxing master was set aside, and It was ordered that a copy of the judgment be forwarded to the Judge President.

CRIMINAL JUSTICE

S V SETHO AND ANOTHER (R153/2017) [2017] ZAFSHC 183 (26 OCTOBER 2017)

This was a special review arising from six matters which had been heard by the same magistrate. The contract of the magistrate had not been renewed, and the reasons for conviction and sentence could not be obtained. The acting senior magistrate requested the high court to set aside the convictions on the grounds of numerous irregularities in the proceedings. [Paragraphs 3 – 5].

Daniso AJ (Rampai J concurring) agreed that the convictions fell to be set aside, noting inconsistencies between the guilty pleas and the offences charged, and finding that there had been a misjoinder in the proceedings. [Paragraphs 6 – 7].

"On perusal of the record of these proceedings, I also noted another glaring irregularity relating to the application or non-application of the provisions of **section 103.** The magistrate, though obliged to hold an enquiry to determine the fitness of the accused to possess a firearm after convicting them of theft, did not do so. Instead she slovenly added the following words to the sentence *"not addressed section 103".* The magistrate "placed a firearm in the hands" of dishonest people without having held an enquiry to determine their fitness to possess firearms. Having said that, the orders of the magistrate which have the effect of not declaring the accused unfit to possess a firearm are therefore, liable to be set aside." [Paragraph 9].

"The simultaneous submission to the high court of 6 (six) cases by the same magistrate for review in itself tends to suggest that the trial magistrate was not constantly monitored which is one of the reasons why the same errors kept on recurring. Had there been regular checks, the trial magistrate would probably not have repeated the same mistakes over and over again. By regular checks we understand constant and educative mentoring of newly appointed or contracted magistrates in order to improve the quality of their performance." [Paragraph 10]

"In my view, these matters bring to the fore the importance and relevance of training and mentoring of acting magistrates. It is quite clear that the magistrate had no adequate knowledge of the court procedures and the applicable legislations. … It is therefore clear that "*regular checks"* alone are not sufficient as obviously by the time the checks are done the magistrate has already finalized the matter. Mentorship and continuous evaluation is essential. It serves no practically useful purpose for a senior magistrate to merely conduct regular checks of a newly appointed or contracted magistrate who has not been given continuous guidance and assistance by a dedicated mentor. In such circumstances such regular checks become meaningless. The errors keep on recurring, the high court critique mounts and then the frustration of the poor unguided magistrates deepens." [Paragraphs 12 - 13]

The convictions and sentences, as well as the orders under the Firearms Control Act, were set aside. It was further ordered that a copy of the judgment be forwarded to "the Chief Magistrates Bloemfontein" and the Director of Public Prosecutions.

MS THILOSHNI RAMDEYAL

BIOGRAPHICAL INFORMATION

Born: 23 November 1967

BProc, University of Durban Westville (1990)

LLM, University of Natal (2005)

CAREER PATH

Acting Judge, Free State High Court (2017, 2018).

Regional court magistrate, Welkom (2006 -)

District court magistrate, Durban (June – September 1996)

Acting magistrate (1996 – 1997)

Senior prosecutor (1995 – 1996)

Prosecutor (1992 – 1995)

Articled clerk, Jackson and Ameen Attorneys (1991 – 1992)

Articled clerk, Sivan Samuel and Associates (1991)

Member, JOASA (1997 – 2006)

Member, ARMSA (2006 -)

SELECTED JUDGEMENTS

PRIVATE LAW

B v B (2243/2017) [2017] ZAFSHC 98 (15 June 2017)

Case heard on 8 June 2017; Judgment delivered on 15 June 2017

The applicant applied for interim relief pending the outcome of divorce proceedings, in which she claimed maintenance in the amount of R14 000. The primary issue for the court was whether the respondent had the capacity to meet this request as a matter of fact. It was found that he was not in a position to meet additional expenses and that some of the applicant's expenses were unreasonable. The respondent was ordered to continue with the expenses he was already responsible for. [Paragraphs 11 – 17].

The court also had to consider custody of a minor child. In considering the best interests of the child, and taking into account the court's role as upper guardian of all children, the court found no reason to restrict the respondent's contact with the child, as this contact had continued since the respondent had left the matrimonial home. However, the Ramdeyal AJ emphasized that this remained an interim measure pending an enquiry and report by the Family Advocate. [Paragraphs 26 – 27].

TSANGARAKIS N.O. AND ANOTHER V KGATO PROJECT MANAGEMENT (PTY) LTD AND ANOTHER (1021/2017) [2017] ZAFSHC 76 (8 JUNE 2017)

Case heard on 1 June 2017; Judgment delivered on 8 June 2017

The applicant and first respondent had entered into a written sale agreement in respect of immovable property, which was sold to the first respondent at an auction. It was common cause that the respondent was in breach of the agreement, and the applicant claimed specific performance in terms of the contract, whereby the respondent would be required to provide a bank guarantee, alternatively to make a payment. [Paragraphs 1 – 6].

Ramdeyal AJ accepted "to a large extent" an argument that the respondent was experiencing cash flow problems [Paragraph 11]. Ramdeyal AJ held that whilst "a court will generally give effect to a plaintiff's choice to claim specific performance, it still maintains a discretion to refuse to decree specific performance in a fitting case." Whilst there were no rules governing the exercise of the discretion to order specific performance, "a court must tread carefully to prevent an injustice resulting; if such order may operate unduly harshly on the defendant or may not produce the desired effect as required by the Applicant." [Paragraphs 17 – 18].

Ramdeyal AJ held that in this case, an order for specific performance would not produce the desired effect. The claim for specific performance was thus dismissed.

CRIMINAL JUSTICE

MANTJIES v S, UNREPORTED JUDGMENT, CASE NO.: A58/2017 FREE STATE HIGH COURT, BLOEMFONTEIN

Case heard 29 May 2017; Judgment delivered 1 June 2017

This case involved an appeal against a double life sentence imposed by the regional magistrate, the appellant having been convicted on two counts of rape. The appellant had pleaded guilty. The appellant argued that the court had overemphasized the seriousness of the offence as the state had not produced a victim impact statement or led evidence regarding any trauma or humiliation alleged by the victims.

Ramdeyal AJ (Reinders J concurring) held that the accused had been correctly convicted. [Paragraph 3]. Ramdeyal AJ noted the factors taken into account in favour of the accused by the trial court, as well as the court's concerns that the appellant had used a knife in committing the crimes, at the age of the victims (14 and 15 years old respectively), and that the victims had "suffered humiliation during these offences." [Paragraph 6]. Ramdeyal AJ found that the accused's "personal circumstances per se do not constitute substantial and compelling circumstances" [Paragraph 14], and that the circumstances of the case were sufficiently serious so as to warrant the application of the prescribed minimum sentence. [Paragraph 16]. Whilst victim impact statements and equivalent evidence were "always of assistance to a court", their absence did "not mean that a court must approach the question of sentence on the footing that there was no psychological harm." [Paragraph 17].

The appeal was dismissed, and the sentences imposed by the trial court confirmed.

ADVOCATE ILSE VAN RHYN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 14 November 1963

B Iuris, University of the Free State (1984)

LLB, University of the Free State (1987)

Advanced Diploma in Labour Law, University of Johannesburg (1997)

CAREER PATH

Acting Judge, Free State High Court (April – May, August – September, October – December 2018; January – March 2019)

Advocate

- Member, Free State Society of Advocates (2011 -)
- Independent Bar (2000 – 2011)
- Free State Society of Advocates (1993 – 1999)

Attorney, Symington & De Kok Attorneys (1990 – 1993)

Candidate Attorney

- CJH De Vries Attorneys (1988 – 1989)
- Naudes Attorneys (1986 – 1988)

SELECTED JUDGMENTS

PRIVATE LAW

WEALTH 4 ALL SOLUTIONS V NTOALENG (4425/2018) [2018] ZAFSHC 195 (30 NOVEMBER 2018)

Case heard 29 November 2018, Judgment delivered 30 November 2018.

Respondent had previously been interdicted from making unlawful and defamatory statements about the business and business affairs of the applicant. In these proceedings, applicant sought to interdict the respondent from making allegedly unlawful and defamatory statements "to the public" regarding the applicant's business affairs, and from "dissuading members of the public" from investing in the applicant's business.

Van Rhyn AJ noted that as applicant sought a final interdict, any disputes of fact would have to be determined in terms of the *Plascon-Evans* rule, whereby the version on the respondents' papers would be accepted unless it did not raise a genuine dispute of fact or was clearly untenable. [Paragraph 8]. Van Rhyn AJ further noted that certain facts were in dispute [Paragraphs 12 – 16]. Van Rhyn AJ then considered whether the applicant had shown a clear right:

"Insofar as Applicant seeks a final interdict it has to prove an unlawful state of affairs and the right to secure a permanent cessation thereof. In saying this, an interdict is not a remedy for the past invasion of rights, but is concerned with present or future infringements. By failing to state the alleged defamatory statements made by the Respondent and in light of the Respondent's version that she, being aware of the order granted by this court, severed all ties with the Applicant and has not made any unlawful and defamatory statements to the public regarding the business affairs of the Applicant, the Applicant has not made out a case for the relief claimed …" [Paragraph 18]

"The Applicant did not provide any further information regarding the conduct of the Respondent or whether the Applicant lost any potential investment business due to the Respondent's conduct. Contained in Annexure J … is an allegation that the Respondent distributed pamphlets advertising her investment business to members of the public who waited in the queue at the FNB Bank. There is nothing unlawful in distributing pamphlets to advertise a business. The evidence before court is not clear and comprehensive regarding the unlawful conduct of the Respondent. … These are disputes of fact, which Applicant should have foreseen. The authorities are to the effect that an application may be dismissed where a dispute of fact which cannot be resolved on paper should have been anticipated by an Applicant. …" [Paragraphs 23 – 24]

The application was dismissed with costs.

L M V F M (4410/2016) [2018] ZAFSHC 194 (8 NOVEMBER 2018)

Case heard 14 – 15 August and 16 – 17 October 2018, Judgment delivered 8 November 2018.

Plaintiff had instituted a divorce action against the defendant, and sought an order for the forfeiture of marital benefits. The claim for forfeiture was based on the grounds that the defendant had become an alcoholic, failed to support the family financially, and had fraudulently caused a bond to

be registered over the plaintiff's immovable property, which had resulted in the sale of the property to repay some of the debts incurred by the defendant. [Paragraph 3].

Van Rhyn AJ held:

"The evidence unmistakably reveals that the Defendant's irresponsible business dealings, illegal as well as fraudulent conduct caused both parties and their children irreparable financial losses, anxiety and concern regarding their future and well-being. Plaintiff gave a detailed, truthful and reliable account of their years spent as a family and her concerns about Defendant's drinking habits. She refrained from making degrading remarks regarding the Defendant during her testimony. She clearly loved the Defendant and respected him, but due to his alcohol abuse and misconduct referred to above, has lost her respect for the Defendant. There is no possibility of a reconciliation." [Paragraph 55].

"For most of the time the marriage was a happy one and even though the periods of dispute and unhappiness were less, which appears to be a factor militating against an order for forfeiture being granted, the Defendant's misconduct is of a serious nature. The Plaintiff's version as to the circumstances which gave rise to the breakdown of the marriage is plausible and consistent with the facts, concessions and admissions made by the Defendant. Presently at the age of 54 years, the Plaintiff has lost the security of owning immovable property and is currently borrowing a motor vehicle. I am satisfied that the Plaintiff has shown, in relation to her pension interest, that if a forfeiture order is not made the Defendant will receive a benefit." [Paragraph 56].

"I do not agree … that Plaintiff may not, while testifying request a lesser order than pleaded in the particulars of claim without amending her claim. Defendant was in no way prejudiced. He is to the contrary benefitted by her virtuous gesture. I am furthermore … convinced that in relation to the Plaintiff the Defendant will be unduly benefitted if the order for forfeiture regarding her pension interest is not granted." [Paragraph 57]

The decree of divorce was granted, with the defendant forefeiting his share in the plaintiff's pension benefits.

CRIMINAL JUSTICE

SHIBANE V S (A23/2018) [2018] ZAFSHC 56 (10 MAY 2018)

Case heard 23 April 2018, Judgment delivered 10 May 2018.

The appellant was convicted on the regional court on one count of rape, and sentenced to 18 years' imprisonment. The complainant, who was five years old at the time of the incident and six years old at the time of the trial, testified in camera and via an intermediary.

Van Rhyn AJ (Mathebula J concurring) found that the answers given by the complainant to some of the questions put to her during the trial raised questions about "her power of observation, recollection and communication skills", and whether she had the capacity "to understand the questions put to her and frame and express intelligent answers in relation thereto." [Paragraph 23]. Van Rhyn AJ further noted that there were discrepancies between the evidence and witness

statements of the complainant and her sister [Paragraph 26]. Van Rhyn AJ noted further that it was necessary to approach the complainant's evidence with caution, as she was "to a certain extent" a single witness, and because she was a young child. [Paragraph 35].

"… It is quite evident that … the evidence relating to the position of the Appellant, as to whether he was lying or sitting, whether the Complainant was lying on top of the Appellant as she indicated with the dolls, kneeling or standing when the immoral act happened and whether the Complainant held her hands next to her body or holding the appellant's penis differs to a great extent. These aspects were found to be immaterial by the Court *a quo*. In my view, corroboration on these aspects or at least some of these aspects would have provided proof beyond reasonable doubt. …" [Paragraph 36].

Van Rhyn AJ held that the prosecution had not proved its case beyond a reasonable doubt. The appeal was upheld.

MABASO V S (A21/2018) [2018] ZAFSHC 54 (10 MAY 2018)

Case heard 23 April 2018, Judgment delivered 10 May 2018

This was an automatic appeal against sentence, the appellant having been convicted of rape in the regional court. The appellant had pleaded guilty, and was sentenced to life imprisonment.

Van Rhyn AJ (Mathebula J concurring) considered whether the fact that the appellant had pleaded guilty should impact on the sentence:

"It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused is a neutral factor. It has also been held that many accused persons might regret their conduct, but that does not necessarily translate to genuine remorse. … Whether an offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. Therefore, in order for remorse to be a valid consideration the Appellant should have taken the court *a quo* fully into his confidence and explained what motivated him to commit the deed, what provoked his change of heart and whether he does indeed have a true appreciation of the consequences of those actions." [Paragraph 11].

Van Rhyn AJ found that the offence was "a serious, appalling and an utterly outrageous crime inflicting horrific suffering and outrage on the Complainant." [Paragraph 14]. Van Rhyn AJ considered the impact of the crime on the complainant, and concluded:

"Undoubtedly, the full extent of the emotional and psychological suffering as it appears from the Victim Impact Statement by the Complainant, combined with the seriously degrading and callous exploitation by the Appellant, whom the Complainant referred to as her "*father*", are seriously aggravating circumstances which deserve to be given appropriate weight in consideration of an appropriate sentence. …"

The appeal was dismissed.

MR DARIO DOSIO

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 24 January 1966

BA, University of Witwatersrand (1988)

LLB, University of Witwatersrand (1993)

Higher Diploma in Taxation Law, University of Witwatersrand (1994)

CAREER PATH

Acting Judge, Gauteng High Court (April, May – June 2013; May – June 2014; April – July 2015; April – June, June – July, August – September 2016; April – June, July 2017; January – April, July 2018; April – June 2019)

Acting Judge, Labour Court (pro bono) (2012)

Regional Magistrate

Johannesburg Magistrates' Court (2012 -)

Soweto Magistrates' Court (2000 – 2012)

Acting regional magistrate (1998 – 2000)

District magistrate (1996 – 1998)

Admitted as an attorney (1996)

Regional public prosecutor and control public prosecutor at Benoni Magistrates' Court (1994 – 1996)

Admitted as state advocate, Witwatersrand Local Division (1994)

Public Prosecutor (1991 – 1994)

JOASA

National President (2008 – 2010)

National chairperson, security committee (2007 -)

Chairperson, Gauteng (2007 – 2008)

National Treasurer (2005 – 2008)

Member (1996 -)

Member, ARMSA (2000 – 2008)

Member, Commonwealth Magistrates and Judges Association (2000 – 2008)

Member, International Association of Judges (2010 -)

Member, South Africa Chapter, International Association of Women Judges (2015)

SELECTED JUDGEMENTS

ADMINISTRATIVE JUSTICE

DDP VALUERS (PTY) V MAKHADO MUNICIPALITY AND OTHERS (0924/2014) [2014] ZAGPPHC 538 (25 JULY 2014)

This case involved an application for the decision of the first respondent to award a tender to Siyabuselela Trading, the second respondent, to be reviewed and set aside. The grounds for review were first, the respondent took irrelevant considerations into account and failed to consider relevant considerations [paragraphs 24-32]; Second, that the tender was obtained fraudulently in that the signature on the municipal valuer affidavit was found to be fraudulent [paragraphs 33-34]; Third, that the tender was granted contrary to the recommendations of the bid evaluation committee ad party to whom it was granted had nominated a person who did not have the requisite experience as a municipal valuer [paragraphs 35-37]; Finally, that the applicant (an unsuccessful tender) was not given reasons by the first respondent for its decision [paragraphs 38-42].

After a consideration of the relevant case law and legislation, the decision was declared unlawful and unfair and set aside on the second, third and final grounds set out above. These, Dosio AJ found, rendered the tender process unfair and the decision unlawful.

"These irregularities have stripped the tender process of an essential element of fairness, namely, the equal evaluation of tenders. … These are consequential flaws. This is not an acceptable tender as defined in the Procurement Act. … In the presence of irregularities the inescapable conclusion must be that either the First Respondent failed to consider material information, because it was not all before it, or if in the unlikely event that it was before it, that it wrongly disregarded it." [{Paragraphs 73 – 75].

However, Dosio AJ declined to substitute a new decision on the basis that the respondent's conduct was not biased to such a degree that it would be unfair to require the applicant to the decision-making process. Dosio AJ elected instead to direct the matter back to the first respondent to for reconsideration.

"Had the First Respondent continued to show lack of insight into its conduct, then it would be clear that referring this matter back to the First respondent would be fruitless. However, that is not the case. The settlement agreement indicates to this court that the First Respondent has understood

that it did not act in an appropriate manner. … Accordingly, this court cannot come to the conclusion that the First Respondent has exhibited bias to such a degree that it would be unfair to require the Applicant to submit to the same jurisdiction." [Paragraphs 85 – 86].

LABOUR LAW

MOTOR INDUSTRY STAFF ASSOCIATION V STANMAR MOTORS (PTY) LTD 2012 JDR 1628 (LC)

Case heard 28 June 2012; Judgment delivered 22 August 2012

This case involved an application to have an arbitrator's award reviewed and set aside. The second applicant was given a retrenchment package with a written agreement that, should a suitable position become available within 12 months, the respondent would offer it to him. Despite four such positions becoming available, the second applicant maintained that no such offer was made. The parties submitted their disagreement to an arbitrator, who found that an offer had been made, and that the second applicant had not accepted it.

Dosio AJ found that the arbitrator had failed to apply his mind and had committed an irregularity by not properly considering the written retrenchment agreement between the parties, which clearly placed an onus and duty on the employer to offer the second applicant any and every suitable position for which he was qualified within a 12-month period [Paragraph 23]. The arbitrator also failed to make a finding, with reasons, on whose version of the facts was correct on a preponderance of probabilities. [Paragraphs 24 - 25]. Dosio AJ found, further, that the arbitrator has applied incorrect principles of law regarding whether a valid offer of employment had in fact been made. [Paragraphs 27 - 29]

Finally, Dosio AJ found that the respondent's failure to reemploy the employee as per the terms of their agreement amounted to an unfair labour practice in terms of the Labour Relations Act. [Paragraphs 32 - 34] Dosio AJ ordered that the arbitrators' award be set aside, and substituted with an order that the respondent be reemployed.

CRIMINAL JUSTICE

S V SEROBA 2015 (2) SACR 429 (GP)

The accused in this case was charged with two counts of murder in respect of killing his wife and, later that day, his sister-in-law. The accused pled not guilty, raising the defence of non-pathological incapacity. He argued that at the time of the murders he suffered a mental defect that made him unable to appreciate the wrongfulness of his actions and acting accordingly.

After analysing the evidence, and the various legal principles applicable to pathological incapacity and criminal responsibility, Dosio AJ held that the guilt of the accused had been proved beyond reasonable doubt. [Paragaph 101]. After considering the facts and the respective evidence of the psychiatrists, Dosio AJ concluded that the accused, being still able to exercise self-control, had acted willfully and with the intention (*dolus directus*) to shoot his wife and sister-in-law. Dosio AJ held further that, even if it was wrong to find that the accused was not suffering from a delusional disorder, there was still the further test for insanity, which required asking whether the mental illness had the effect of impairing the accused's capacity for insight into the wrongfulness of his act, or the capacity to control his actions. Dosio AJ found that the accused's "capacity for insight into the wrongfulness of his act or the capacity to control his actions in accordance with this insight was not impaired. He did have insight and self-control." [Paragraph 93]

Dosio AJ thus concluded that "The evidence does not show that he lacked criminal responsibility, or that he was incapable of appreciating the wrongfulness of his acts, or that he was unable to act in accordance with an appreciation of the wrongfulness of his acts." [Paragraph 104].

The accused was convicted on two counts of murder.

SKHOSANA V S 2016 (2) SACR 456 (GJ)

Case heard 7 June 2016, Judgment delivered 7 June 2016

The appellant appealed against conviction for housebreaking with the intent to steal and theft. He argued that his rights had not been explained to him in terms of section 35 of the Constitution

before a security officer took a photograph of him on his cellphone upon his arrest. He argued that the evidence was inadmissible and thus the court a quo erred in convicting him.

In assessing whether the photograph was admissible, Dosio AJ (Weiner J concurring) considered whether (1) the image had any bearing on the issue before the court; (2) whether it was a true image; (3) whether it had been edited (4) that it should be presented to the court to be viewed; and (5) that the device on which it was captured was reliable. [Paragraph 12] Dosio AJ held that all of these factors were present, and thus the court a quo was correct to admit the photograph as evidence. Section 37(1)(d) of the Criminal Procedure Act allows for a police officer to take a photograph of an arrested person. Although the photograph was taken by a security officer, and not a police officer, it had probative value in that it helped the state witnesses in the explanation of their testimony and substantiated their testimony. Furthermore, the admissibility of the photograph was not disputed in the court a quo. [Paragraph 30].

Dosio AJ held further that the magistrate had not committed an irregularity in questioning the appellant's co-accused although Dosio AJ saw sit to issue a "salutary warning that presiding officers should always exercise the utmost patience and respect when questioning any witness or accused in a trial. Words or phrases which are used with the intention of rudeness or disrespect could in certain instances amount to an irregularity, thereby vitiating the proceedings." [Paragraph 26].

The appeal was dismissed.

S V MOGARAMEDI 2015 (1) SACR 427

Judgment delivered 15 August 2014

This was an appeal to a full bench against a sentencing decision in which the court *a quo* had found the accused guilty of murder and sentenced him to life imprisonment. The appellant, who had been practicing as a sangoma for ten years prior to the case, had killed his sister and removed her genital organs as part of his final initiation. [Paragraph 4]. The appellant had pleaded guilty. The appellant argued that compelling and substantial circumstances existed to justify a lesser sentence than the prescribed minimum sentence of life imprisonment. These circumstances were (1) his age and the fact that he was a first time offender; (2) the killing was motivated by a deep rooted religious belief and was a necessary part of his initiation to become a sangoma and (3) that he has suffered emotional hardship after committing the offence. He therefore argued that a life-sentence should not have been imposed.

Dosio AJ (Kollapen J and Thobane AJ concurring) engaged in the balancing of two rights in the Bill of Rights namely the right to life (section 11) and the right to cultural and religious practices (section 31) [paragraphs 16 - 19]. Dosio AJ held that:

"The appellant's religious beliefs and convictions cannot supersede the deceased's right to life. Although everyone has a right to practise their belief, as soon as this belief leads to an action which falls within the bounds of illegality, for instance, a murder to obtain body parts, then in terms of s 31(2) of the Bill of Rights it can no longer be condoned or protected merely because it is based on a religious or cultural belief. Cultural and religious beliefs must respect life and must be practised in line with the Bill of Rights." [Paragraph 24].

Regarding sentence, Dosio AJ held that the case was one of "exceptional seriousness", and that the circumstances, "cumulatively regarded" showed that a sentence of life imprisonment was just. The appeal was dismissed.

SELECTED ARTICLES

"CONSTRUCTING HOPE: A MULTI-AGENCY PROGRAMME MODEL FOR YOUNG SEX OFFENDERS LIVING WITH HIV/AIDS IN SOUTH AFRICA" SEXUAL OFFENDER TREATMENT, VOLUME 2 (2007), ISSUE 2. [CO-AUTHORED WITH DOUGLAS P. BOER]

This article considers the implications of the prevalence of HIV/AIDS among young sex offenders in South Africa, and argues that this issue "both complicates and underlines the importance of delivering effective multi-agency sex offender programmes to these individuals." The article emphasises the importance of reducing reoffending rates as a way of limiting the spread of HIV to new victims. The article proposes "an integrative programme that incorporates proven models of sex offender treatment in combination with medical, educational and family support systems to facilitate community reintegration of young sex offenders living with HIV/AIDS."

The article reviews various multi-agency programmes [pages 2 – 3], and identifies common features among them [Page 3]. The proposed programme would focus on HIV/AIDS illness management and HIV/AIDS infection reduction, "which coincides with offence prevention." [Page 4].

- Article available at **https://researchcommons.waikato.ac.nz/bitstream/handle/10289/6304/Constructing%20Hope.pdf?sequence=1&isAllowed=y**

ADVOCATE JOHN HOLLAND-MÜTER

BIOGRAPHICAL INFORMATION

Born: : 28 September 1956

B Iuris, University of Pretoria (1978)

LLB, UNISA (1993)

CAREER PATH

Acting Judge, Gauteng High Court (2015 – 2019, 45 weeks total)

Advocate, Pretoria Society of Advocates (1998 -)

Law Lecturer, Justice College (1988 – 1998)

Magistrate (1982 – 1988)

Prosecutor (1981 – 1982)

Member, Pretoria Bar Council (2010 – 2019)

Member, Christian Lawyer Association (2016 – 2019)

Parish Council member, Dutch Reformed Church Villieria (2012 – 2019)

Chairperson, Governing Body, Die Höerskool Wonderboom (2003 – 2010)

Vice – Chair, Governing Body, Laerskool Rietfontein – Noord (1996 – 2005)

SELECTED JUDGEMENTS

PRIVATE LAW

BOUTTELL v ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO.: 55458/2014 (GAUTENG HIGH COURT, PRETORIA)

Case heard 26 November 2016; Judgment delivered 28 January 2017

The issue before the court in this case was about the amount to be payed towards the plaintiff for his future loss of income as a result of a motor vehicle accident. In determining the plaintiff's loss of income, the court considered contributions he had made prior to the accident into a retirement annuity fund. The questions was, since this was a voluntary contribution and not required by his company as part of the plaintiff's remuneration package, whether it formed part of his income pre and post the accident.

Holland-Müter AJ found that it could not form part of his earnings as it was contributed voluntarily and thus was akin to an investment in a building society, rather than to an overall benefits package from the company. Holland-Müter AJ found that "*There is in my view a clear distinction between a so-called pension fund where the person makes a voluntary payment towards the fund and that of a pension fund in terms of an agreement of service where the employee is obligated to be a member of such fund*" [Paragraph 22].

On appeal, the Supreme Court of Appeal upheld the judgment of the High Court. (**Bouttell v Road Accident Fund 2018 (5) SA 99 SCA**). The court stated: "*In my view the court a quo was correct when it concluded that 'provisions for the future', such as an investment cannot be taken into account when calculating future loss of earnings for the purpose of provisions of the RAF Act*." [Paragraph 11].

TA DU PREEZ V L PITOUT, UNREPORTED JUDGMENT, CASE NO.: 28689/2018 (GAUTENG HIGH COURT, PRETORIA)

Judgment delivered 24 April 2019

This case involved a dispute over the validity of two separate versions of the deceased's will and testament. The applicant, the executor of the deceased's estate, applied for an order declaring the

will dated 19 November 2017 null and void, and declaring the will dated 16 June 2017 to be the deceased's final will and testament. The applicant had drafted numerous wills on behalf of the deceased and had filled the 16 June 2017 will with the Master after the death of the deceased. Thereafter the applicant received a letter informing him of another document, dated 19 November 2017, purporting to be the deceased's final will and testament. Some time later, the applicant was informed by the respondents that they had found a further will, also dated 19 November 2017. The applicant lodged this document with the master but raised concerns about its validity.

Holland-Müter AJ reviewed the formal requirements for the valid execution of a will, including the mental state of the deceased at the relevant times, and concluded that the deceased lacked the mental capacity to make a valid will at the relevant time (referring to the later wills dated 19 November 2017) as required by the section 4 Wills Act. [Paragraph 31].

In addition, the wills did not meet the formal requirements for validity. [Paragraph 34]. Holland-Müter AJ noted that the court was faced with two irreconcilable versions [Paragraph 36], and reiterated the "improbabilities" of the respondents' version. [Paragraph 38]. There were no reasonable grounds to condone non-compliance with the formal requirements in respect of the 19 November 2017 wills. [Paragraph 40].

The application was accordingly granted.

ADMINISTRATIVE JUSTICE

MOTAU AND ANOTHER V HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA AND OTHERS (29967/2016, 30323/2016) [2018] ZAGPPHC 748 (23 FEBRUARY 2018)

Case heard 25 October 2017; Judgment delivered 23 February 2018

Applicants had both lodged separate claims against the Road Accident Fund (RAF), which rejected their RAF 4 Forms (being a serious injury assessment report, compiled by a medical practitioner . They appealed these decisions to the RAF Appeal Board, and again were unsuccessful. [Paragraphs 3- 7]. Applicants then sought to review of the Appeal Board's decision, in terms of the Promotion of Administrative Justice Act.

Holland-Müter AJ identified the question to be addressed as "whether a reasonable administrator, with the evidence disclosed, would have reached the same decision that the tribunal reached?" [Paragraph 11]. Regarding the first applicant, Holland-Müter AJ found that the tribunal did not consider all the evidence presented to it, and that the applicant should have been presented to clarify the tribunal's uncertainties in order to satisfy the principle of *audi alteram partem.* [Paragraph 12.5].

The decision of the tribunal was thus set aside, and the HPCSA was directed to re-appoint a new tribunal to determine the dispute. [Paragraph 14].

"The applicant's attorneys further … requested the tribunal to address the tribunal to hear evidence with regard to the alleged injury. It was submitted that it would be in the best interest of all the parties if evidence be heard and oral arguments be submitted. … This request to be present and to address the tribunal was ignored in toto and no response was coming from the tribunal. In my view this amounts to an unfair procedure and the ignorance of the well known maxim of ***audi alteram partem.*** The tribunal in all probabilities never considered such request and never gave any reasons why such request was not considered at all." [Paragraph 15.5] As wit hthe first applicant, the decision was set aside with a direction that a new tribunal be appointed to determine the dispute.

CIVIL PROCEDURE

JENNI BUTTION (PTY) LTD v HYPROP INVESTMENTS LIMITED (65643/2015) [2015] ZAGPPHC 692 (6 OCTOBER 2015)

Case Heard 22 September 2015; Judgment deliver 6 October 2015

The applicant brought an urgent application (*mandament van spolie*) against the alleged spoliation of its premises by the respondent, requesting immediate restoration of access to the property. The respondent had warned the applicant that it had an eviction order and then, on the same day, had forced the locks of the applicant's premises and removed its trading stock. The respondent argued that the applicant had 'abandoned' the property. It also argued that the applicant delayed unreasonably in bringing the application and that its failure to respond to an email (threatening eviction) amounted to 'consent'.

Holland-Müter AJ rejected both of the respondent's arguments, holding that "[t]he only inference from the conduct of the respondent was that it self-helped it to "restore" possession of the

premises. This is in my view nothing else but spoliation." [Paragraph 16]. Holland-Müter AJ ordered that the premises be restored, and the respondent be given unrestricted access.

The judgment was overturned on appeal (**Hyprop Investments Ltd v Jenni Button (Pty) Ltd and Klopper N.O. (Intervening) (65643/2015, A787/2015) [2017] ZAGPPHC 249 (25 April 2017)**). The appeal court held that:

"*It is in my view clear that a serious and bona fide doubt existed whether Jenni Button (Pty) Ltd had the necessary locus standi to launch the spoliation proceedings, and that it had shown that it, as a legal entity, was the possessor of the premises in terms of a contractual right granted to it. The Court a quo ought to have approached the dispute between the parties on this basis, but the learned Judge did not do so. In the light of the conflicting versions relating to what the actual terms of any agreement were between the parties, and in fact who were the parties to any such agreement relating to the Woodlands shopping centre, it is my view that the Applicant in the Court a quo did not prove on the balance of probabilities that it had possession of the particular premises. The application ought therefore not to have been granted.*" [Paragraph 13]

ADVOCATE AVRILLE MAIER-FRAWLEY

BIOGRAPHICAL INFORMATION

Date of birth: 21 June 1962

BA, University of Witwatersrand (1982)

LLB, University of Witwatersrand (1984)

Higher Diploma in Alternative Dispute Resolution (*summa cum laude*) at University of Pretoria/Arbitration Foundation of South Africa (2013)

CAREER PATH

Acting Judge, Gauteng High Court (2016 – 2019)

Practicing Advocate (1990 -)

Professional Assistant, Deneys Reitz Attorneys (1989)

Articled Clerk, Deneys Reitz Attorneys (1987 – 1988)

Senior Public Prosecutor, Johannesburg Regional Court (1987)

Public Prosecutor, Johannesburg Regional Court (1986 – 1987)

Public Prosecutor, District Court (1985 – 1986)

Member, Arbitration Foundation of Southern Africa (2013 -)

Member, Johannesburg Society of Advocates (1990 -)

SELECTED JUDGEMENTS

PRIVATE LAW

LOMBARD INSURANCE CO LTD v SCHOEMAN AND OTHERS 2018 (1) SA 240 (GJ)

Case heard on 6 June 2017; Judgment delivered on 17 July 2017

Golden Sun, which bought fuel from Sasol, requested the applicant to issue a demand guarantee in favour of Sasol, in return for which the respondents stood surety. The demand guarantee contained certain formal requirements, and the issue before the court was whether strict compliance was necessary for the demand guarantee to be valid, or whether substantial compliance was sufficient. The judgment noted that this issue was a matter of debate both in South African and English law.

The applicant sued the respondents as surety and co-principal debtors of Golden Sun, which had gone into liquidation. In determining whether there was compliance with the terms of the guarantee, Maier-Frawley AJ considered what the terms required in their contractual context, specifically their commercial purpose, as well as the inherent features of a demand guarantee. Maier-Frawley AJ found that the essential requirement (which was that the guarantor had received a demand confirming that the debt was due and payable) was met in this case, although it had not taken place at the stipulated address. [Paragraphs 46 – 55].

Maier-Frawley AJ held that it was not an essential requirement for the guarantor to attend at the beneficiaries premises to receive the demand, and therefore that there had been sufficient compliance with the terms of the guarantee. [Paragraph 55].

Judgment was granted in favour of the applicants.

The judgment was upheld by the SCA in **Schoeman and Others v Lombard Insurance Co Limited (1299/2017) [2019] ZASCA 66 (29 May 2019)**. The court found that: "I am in agreement with Maier-Frawley AJ in the court below that there is 'little to gain from attempts to divine the essential distinction between letters of credit, on the one hand, and demand guarantees, on the other': the real issue, which involves an interpretation of this particular demand guarantee, is 'simply whether there was compliance with the terms of the guarantee under circumstances where the beneficiary's demands for payment were made to the guarantor at its address, rather than at the address of the beneficiary'." [Paragraph 22].

OAKHURST INSURANCE COMPANY LIMITED v B-SURE AFRICA INSURANCE BROKERS (PTY) LTD AND OTHERS 2017 JDR 2127 (GJ)

Case heard on 21 November 2017; Judgment delivered on 15 December 2017

This case involved a dispute over a restraint of trade agreement. The applicant and first respondent (both employers) had concluded an agreement in terms of which they agreed to respect the restraint of trade agreements each of them had with their respective employees. Essentially, neither party could employ employees of the other, without written consent, where there was a restraint of trade agreement in place. This agreement was later made an order of court. The applicant launched a application for a mandamus, compelling the first respondent to terminate the employment of the second and third respondents, which employment, the applicant argued, was in breach of the above agreement and court order.

The respondents argued that the restraint of trade agreements were unreasonable. The issue before the court was whether the reasonableness of the restraints of trade agreements (with the second and third respondents) was a relevant consideration, in light of the agreement between the employers.

Maier-Frawley AJ found that employers could not be allowed to bypass established legal principles that allow for employees to challenge the reasonableness of restraints of trade. Maier-Frawley AJ held that

"In my view, it would be against public policy for competing employers to attempt to bypass established legal principles that are applicable to restraint of trade agreements by means of their conclusion of agreements that would have the effect or result that employees are thereby prevented from challenging the reasonableness of their restraint agreements but are nonetheless restricted from taking up employment or even subjected to forced dismissals for accepting employment, albeit in contravention of their restraints, in such circumstances." [Paragraph 41]

The application was dismissed with costs.

CIVIL PROCEDURE

SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD v SOUTH AFRICAN BROADCASTING CORPORATION PENSION FUND AND OTHERS 2019 (4) SA 608 (GJ)

Case heard on 6 December 2018; Judgment delivered on 18 January 2019

Applicant was the former employer of the second respondent, Mr Hlaudi Motsoeneng. Second respondent's employment with the applicant was terminated and, as a result, he was entitled to a withdrawal benefit from the SABC pensions fund (the fund). However, the applicant informed the fund that it was investigating Motsoeneng for misconduct and requested that it withhold payment of whole his benefit, to which the fund agreed pending the outcome of an urgent application to interdict payment. [Paragraphs 1 – 5]. Applicant sought relief in two parts: first, interim relief to restrain the fund from paying out the moneys described, and second, to set aside an award to Motsoneng by the SABC's Governance and Nominations Committee. This judgment dealt only with the interim relief sought.

Maier – Frawley AJ first dealt with a range of preliminary issues raised by the parties. Maier-Frawley AJ found that "[c]ourts have always been inclined to adopt a pragmatic approach in dealing with technical objections" [Paragraph 37], and that a common sense approach to the acceptance of affidavits, with the true test being whether all the facts pertaining to the matter had been put before the court. [Paragraph 41]. Maier-Frawley AJ then rejected an argument that the SABC had made out a new case in reply [Paragraphs 45 – 52], and dismissed a striking out application by the respondents [Paragraphs 54 – 61].

Maier-Frawley AJ further condoned the late filing of the SABC's replying affidavit [Paragraphs 62 – 72], taking into account that "the issues raised by the matter are of considerable importance, not only to the parties but also to members of the public at large. … That the case evokes the public interest in the light of the fight against corruption in our country permits of no doubt." [Paragraph 70]. Maier-Frawley AJ rejected an argument that a report by the Public Protector, relied on by the SABC, constituted impermissible hearsay evidence. [Paragraphs 73 – 76].

Maier-Frawley AJ then turned to consider whether the requirements for an interim interdict had been met [Paragraph 77 ff]. As to whether the SABC had a prima facie right and feared interference with that right, it was held that "[t]he allegations made in the SABC's affidavits appear to prima facie point to the fact that Motsoeneng unlawfully received payment of a success fee in the amount of R11 508 549,12 …", and that the evidence put forward by the SABC was "sufficient to prima facie point to Motsoeneng's intentional misappropriation of public funds. The SABC's allegations support the inference that Motsoeneng knowingly acted in his own self-interest in appropriating to

himself, for his own use, public funds entrusted to his care as public functionary, to which he was not legally entitled, which caused the SABC to suffer loss." [Paragraphs 88 – 89] As no serious challenge had been made to these allegations, applicant had established a prima facie case [Paragraph 97].

Maier-Frawley AJ found further that the applicant risked suffering irreparable harm if the interdict was not granted [Paragraphs 100 – 102], and found that the balance of convenience was in favour of the granting of the interdict [Paragraphs 103 – 108].

The application was therefore granted.

CRIMINAL JUSTICE

S V SEBOGO 2018 JDR 2212 (GJ)

Case heard 22 October 2018, Judgment delivered 12 November 2018

Appellants were convicted in the Regional Court of robbery with aggravating circumstances, and attempted robbery with aggravating circumstances. In addition, the first appellant was convicted on four counts of rape (second appellant was acquitted on the rape charges). First appellant was sentenced to an effective 30 years' imprisonment, and second appellant to 15 years. The appeal was against conviction and sentence.

Maier-Frawley AJ noted that the main issue regarding the conviction was the identity of the perpetrators, and that the complainant was deemed to be a single witness in respect of the rape charges [Paragraphs 9, 12]. Maier-Frawley AJ held that:

"The first appellant's version was a denial of his involvement the incident or that he knew the first complainant. The version of the first complainant was bolstered by the objective DNA results, which to my mind, constitutes corroborating evidence that the first appellant in fact had sexual intercourse with the complainant. That evidence was, to say the least, compelling. … The trial court was, in my view, correct in convicting the first appellant of rape, at least on the two counts in respect of which she alleged he had intercourse with her without her consent. …" [Paragraphs 18 – 19]

Maier-Frawley AJ noted that, regarding two of the counts of rape, the state relied on the doctrine of common purpose liability [Paragraph 21]. The doctrine of common purpose had bene correctly applied by the regional court, and the appeal against conviction fell to be dismissed [Paragraphs 22 - 24].

The appeal against sentence was also dismissed. Maier-Frawley AJ found:

"The courts are duty bound to send out a clear message that perpetrators of serious crimes will be punished appropriately and courts are moreover required to show due deference to the legislature's enactments of laws. ... Rape under *any* circumstances is a deplorable and terrible crime. ... It is an act of heinousness that defies logic and disaffiliates from sense and sensibility. In my view, it is nothing more than a show of power and control which is aimed at annihilating the dignity of its prey. Moreover, it is known to leave far-reaching yet oft unseen wounds upon the psyche of its victims. That is undoubtedly why the legislature enacted such serious punishments for such offences." [Paragraphs 27 – 28].

MR DAVID MAKHOBA

BIOGRAPHICAL INFORMATION

Born: 7 August 1963

B Iuris, UNISA (1989)

LLB, Vista University (1997)

LLM, University of Pretoria (2001)

CAREER PATH

Acting Judge, Gauteng High Court (November – December 2002, March – April, June 2003, July – October 2004, October – November 2005, February – March 2013, April – May 2014, July – September 2015, May – June 2016, January – February, July – September 2017, October – December 2018, April – June 2019).

Regional Court Magistrate (1999 –)

District Court Magistrate, Department of Justice (1995 – 1999)

Public Prosecutor, Department of Justice (1990 – 1994)

Association of Regional Magistrates of South Africa (ARMSA)

President (2013 –)

Member (1991 -)

Patron, South African Chapter, International Association of Women Judges (2013 -)

Member, Black Lawyers Association (2010 – 2013)

Member, African National Congress (1998 – 2007)

SELECTED JUDGMENTS

PRIVATE LAW

RAMDIN V MINISTER OF POLICE (07223/14) [2018] ZAGPJHC 661 (13 DECEMBER 2018)

The plaintiffs claimed damages, including constitutional damages, against the defendants for the unlawful arrest and killing of their son by the second defendant. The respondents had conceded liability in favour of the plaintiff. The only issue before the court related to the claim for constitutional damages, to the value of three million rand. The plaintiffs had testified as to how the death of their son affected their health.

Makhoba AJ held that there "must be a connection between an award and a breach of constitutional nature." Makhoba AJ referred to **Michael Komape and Others v Minister of Basic Education 2018 ZALMPPHC 19**, where the court found that "the constitutional damages claimed were punitive damages" and would result in the family being overcompensated. [Paragraph 10]. Regarding the onus required to prove the claim and the effect of the agreement by the respondent on paying general damages, Makhoba AJ held:

"In the matter before me there is a duty on the Plaintiff to show that there was a direct breach of a constitutional right as a result of the actions of the 2nd defendant. In my view the Plaintiff failed to show such a breach of constitutional breach. Even if the court were to decide that there was such a breach. The 1st defendant has already agreed to compensate the Plaintiffs in form of general damages agreed to by the parties before the start of the trial. Should the court award the Plaintiff for a breach of constitutional damages this will result in the Plaintiffs being over compensated." [Paragraph 11].

The application for a claim of constitutional damages was dismissed with costs. The court confirmed the order of damages for future medical expenses of R66 000.00 and general damages of R300 000.00.

COMMERCIAL LAW

ACCOUNTING MADE EASY CC V SCHOOL ACCOUNTIN MADE EASY (PTY) LTD (81365/2016) [2019] ZAGPPHC 215 (25 JUNE 2019)

This was an application to interdict and restrain the respondent in terms of the Trade Marks Act. Both parties offered accounting lessons and learning material. The applicant was seeking the exclusive use of the mark 'accounting made easy'. In a counter application, the respondent argued that the applicant's trade mark was generic, and a general description of a product for educational purposes and therefore not registrable. The respondent therefore sought the removal of the applicant's registered trade mark in terms of the Trade Marks Act.

After referring to the guiding principles established in the **Plascon-Evans Paints v Van Riebeeck Paints**, Makhoba AJ found out that the applicant must prove that the mark "school accounting made easy" may cause confusion or deceive customers as it closely resembles the applicant's registered mark. [Paragraphs 11 – 12]. The applicant had to show only that a substantial number of persons may be confused as to the origin of the respondent's sign. Relying on **Yuppiechef Holdings (Pty) Ltd v Yuppie gadgets Holdings (Pty) Ltd**, Makhoba AJ held that the use of the same marks on other goods and services, falling outside the class of goods or services covered by the registration did not amount to an infringement under the Trade Marks Act. Emphasis was placed on the different nature of the services the parties offered.

Makhoba AJ held that what the applicant sought to enforce did not amount to an infringement since it fell outside the class of the services that the respondent was offering. The court further reasoned that both the trademarks, and the services rendered by the parties were unique from each other. The different logos used by the two businesses further justified why there was no confusion between the business services offered by the different parties. [Paragraphs 18 – 23].

The application was dismissed with costs. The counter application was also dismissed with costs on the grounds that the its trade mark was different from other trademarks. [Paragraphs 24 – 27].

CIVIL PROCEDURE

UPHAWO TECHNOLOGIES CC V MARTIN MORGAN MOTORS CC (12512/2012 [2017] ZAGPPHC 51 (17 FEBRUARY 2017)

This was an application to amend particulars of claim so as to include a rectification of a written agreement. The respondent objected on two grounds, namely that the application sought to introduce a new cause of action which had prescribed, and second, that the amendment was excipiable. in the main action, the applicant sought to cancel a contract of purchase of a motor vehicle from the respondent and to return the vehicle to the respondent. The respondent argued that it did not enter into any agreement with the applicant, but with a Mr S E Kumalo in his personal capacity. While the agreement reflected the name of Mr SE Kumalo in certain parts, the applicant maintained that such was an error and the true contracting party was the applicant.

Makhoba AJ held that the court was empowered to allow any party at any stage before judgment to grant leave to amend any pleading or documents on such terms as to costs or other matters as it deemed fit.

"Therefore in terms of this rule it is possible for the applicant to amend a pleading at any time before judgment. Therefore the argument by counsel for the respondent as to why applicant took so long to apply for the amendment is without substance and cannot succeed. Therefore applicant is entitled to amend the particulars of claim at any time before judgment." [Paragraph 5]

Makhoba AJ then dealt with the second defence raised, namely that the amendment was designed to bring a new cause of action. After referring to case law, Makhoba AJ concluded that a party seeking an amendment bears the onus of showing that it is made in good faith and that there is an absence of prejudice. The court referred to several cases where courts allowed the substitution of a party to ensure that the true plaintiff was before the court. The court was satisfied that granting the amendment would not prejudice the other party. [Paragraphs 10 – 12].

The applicant was granted leave to amend the pleadings, and the respondent was ordered to pay the costs of the application.

CRIMINAL JUSTICE

G v S (A652/13) [2014] ZAGPPHC 460 (17 April 2014)

The appellant was charged and convicted WITH contravening the Maintenance Act, in that he violated a High Court order for the payment of maintenance and school fees for the maintenance of his two minors. The maintenance arrears amounted to R15 240.00. The appellant raised three grounds on appeal. First, the appellant argued that the state did not prove the appellant's guilty beyond reasonable doubt and this was largely due to the incompetence of the appellant's legal representative. Secondly, the appellant raised the issue that the court a quo ought to have transformed the criminal trial into an inquiry in terms of section 41 of the Maintenance Act. Lastly, the appellant raised the issue that he did not receive a fair trial.

Makhoba AJ (Kollapen J concurring) pointed out that inept advice from a legal representative can only affect the appellant's right to trial if it affected the appellant's right to a fair trial. On its own, the incompetence of a legal practitioner is not enough to render a trial unfair. [Paragraph 4.1] On the question of whether the magistrate ought to have converted the criminal trial into an enquiry, Makhoba AJ held that such power is discretionary. There were no circumstances that suggested that the appellant's financial circumstances had changed to affect his ability to pay maintenance. The court thus found no reason for the conversion of the trial to an inquiry in terms of the section 41 of the Maintenance Act. [Paragraph 4.2]. Lastly, Makhoba AJ dealt with the conduct of the magistrate, particularly allegations that the presiding magistrate conducted cross examination on behalf of the state, thereby assisting the state to prove its case. Makhoba AJ held that such questioning must be aimed at ascertaining the appellant's version. It had not been shown that the questioning prejudiced the appellant.

The appeal was dismissed.

BALETE V S (A884/2013) [2014] ZAGPPHC 288 (17 APRIL 2014)

The appellant was charged with four counts of theft, and pleaded guilty to counts one and two and not guilty to counts three and four. He was convicted and sentenced on count one and two to three years imprisonment on each count. The trial court did not order the sentences to run concurrently, and the appellant was effectively sentenced to six years' imprisonment. The appeal was directed at the sentence and several grounds were raised namely that: (1) the sentence was severe and disproportionate; (2) the trial court failed to consider mitigating factors; (3) the sentence accounted only for retribution and deterrence, at the expense of rehabilitation of the accused; (4) and that the time spent in custody was not taken into account during sentencing.

Makhoba AJ began by confirming the established principles in relation to appeals on sentence, namely that courts of appeal will not alter the imposed sentence unless it is manifestly unreasonable or if there was an improper exercise of the discretion by the trial judge. Makhoba AJ held that the age of the appellant ought to have been taken into account. Child offenders had to be distinguished from adult offenders in that their crimes might stem from immature judgments. Considering all aspects, namely that the appellant was 18 years at the time of commission of the crimes; he was a first offender; he had pleaded guilty to the charges and that the value of the stolen items was not substantial, Makhoba AJ found that the sentence imposed was excessive, and that there had been an improper exercise of the discretion by the trial court. The court also remarked that the trial court ought to have requested a pre-sentence report to impose a proper sentence. [Paragraphs 4 – 5].

The appeal was upheld, and the sentence was substituted with one of 18 months imprisonment, both counts being taken as one for sentencing purposes. The sentence was suspended for a period of three years on condition that the accused was not convicted of an offence of which dishonesty was an element committed during the period of the suspension.

MEDIA COVERAGE

Comments quoted when sentencing a convicted rapist:

"A MAGISTRATE in the Pretoria Magistrate's Court told a convicted rapist he should not have committed the crime because he was rich and could easily have afforded the services of sex-workers.

Magistrate David Makhoba said this before sentencing Samuel Adebamowe, 41, a rich Nigerian national, to 15 years in jail.

"He [Adebamowe] is a man of high calibre. He is said to have been a director of a big company and also lives in a mansion worth millions".

"But his actions speak otherwise. There are sex-workers he could have gone to".

- Fhumulani Khumela, 'Rich rapist could have paid for sex', *Sowetan Live* 28 March 2015. (Available at https://www.sowetanlive.co.za/news/2015-03-28-rich-rapist-could-have-paid-for-sex/).

ADVOCATE MOLOBOHENG MDALANA-MAYISELA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 9 June 1971

BJuris, University of Fort Hare (1994)

LLB, University of Fort Hare (1996)

CAREER PATH

Acting Judge, Gauteng High Court (September – November 2013; January – February, August – September, September – October 2017; March, April – May, June, July, September 2018; January – February, March, June, September 2019).

Advocate (1997 – 1998; 2008 –)

National Director, SizweNtsaluba VSP Auditing Firm (2007 – 2008)

Regional Head, National Prosecuting Authority (Free State and Northern Cape), (2004 – 2007)

Deputy Director of Public Prosecutions, National Prosecuting Authority, (2001 – 2004)

Senior State Advocate, National Prosecuting Authority, (1998 – 2001)

Advocate, (1997 – 1998)

Johannesburg Bar

High Court Sub-Committee (2013 – 2014)

Bursary Fund subcommittee (2013)

Member, Johannesburg Bar Council 2012 – 2013

Member, Johannesburg Society of Advocates (1997 – 1998; 2008 –)

Advocates for Transformation

Member, Transformation Committee (2012 – 2013)

Member (2008 –)

SELECTED JUDGMENTS

PRIVATE LAW

FIRST RAND BANK LIMITED V FONDSE AND OTHERS (65596/17) [2018] ZAGPPHC 316 (4 MAY 2018)

Case heard 30 April 2018, Judgment 4 May 2018.

The applicant sought an eviction order against the three respondents, who opposed the application and raised two points *in limine*. The only issue the court had to decide was whether the applicant lacked locus standi.

At the time when the proceedings commenced, the applicant was not the registered owner of the property. [Paragraphs 4 - 5]. In determining the case, Mdalana – Mayisela AJ held that the unlawful occupation by the respondents was to be decided with regard on whether the applicant was the registered owner of the property when the application was launched. [Paragraph 7].

"In argument the applicant sought to demonstrate by reference to correspondence and conditions of sale that the applicant was in charge of the property. In my view neither the conditions of sale nor the correspondence are of assistance to the applicant. The letter of 21 August 2017 properly construed was a letter of demand to the respondents to vacate the property. There is nothing in this letter and the conditions of sale which demonstrates that the applicant was in charge of the property at the relevant time. in fact on the papers as they stand the persons who have been in occupation and in charge of the proper are the respondents. …" [Paragraph 8].

Mdalana – Mayisela AJ referred to **Ndlovu v Ngcobo 2003 (1) SA 113 (SCA)**, where the court held that the previous owner of immovable property who remains in occupation becomes an unlawful occupier upon transfer to the purchaser. [Paragraph 9]. Since the property was only transferred to the applicant's name three months after the commencement of the proceeding, the applicant lacked the requisite standing to launch the application.

The application was therefore dismissed.

CRIMINAL JUSTICE

KHOZA V STATE (A672/2016) [2018] ZAGPPHC 718 (2 MARCH 2018)

Case heard 19 March 2018, Judgment delivered 29 March 2018

The appellant was convicted on a count of rape and sentenced to life imprisonment. This was an automatic appeal in respect of the in terms of section 309(I)(a) of the Criminal Procedure Act. The grounds of the appeal were that the trial court misdirected itself in finding that no substantial and compelling circumstances existed, and that the life sentence was disproportionate to the circumstances of the case.

Mdalana-Mayisela AJ (N Davis J concurring) dealt with the principles governing appeals and emphasised that sentencing remains a matter for the discretion of the trial court. The court of appeal may only interfere with the trial court sentencing if it is shockingly inappropriate [Paragraph 4). Mdalana-Mayisela AJ considered the personal circumstances of the appellant, including his health circumstances (appellant suffered from epilepsy), and concluded that while a medical condition may in certain circumstances afford a good reason for a non-custodial sentence, there was no general rule that ill health can automatically relieve a convicted person from imprisonment. [Paragraph 6].

Mdalana-Mayisela AJ also also dealt with the issue that no evidence was tendered in court on the emotional and psychological trauma suffered by the complainant. It was held that the lack of such evidence must not be construed to mean that the victim did not experience trauma. [Paragraph 9] Other aggravating circumstances included the fact that the appellant had raped the victim without a condom. Relying on the SCA judgment in **S v PB 2011 (1) SACR 448 (SCA)**, Mdalana-Mayisela AJ found that such an incident was an aggravating circumstance given that rape victims are left with physical, emotional, psychological trauma and to HIV related hardships. [Paragraphs 10, 13].

The appeal was dismissed.

MALULEKE V S (A634/2016) [2018] ZAGPPHC 319 (29 MARCH 2018)

Case heard 13 March 2018, Judgment delivered 29 March 2018

The appellant was convicted with other accused on two counts of robbery with aggravating circumstances and two counts of rape. He was sentenced to fifteen years imprisonment on the count of robbery with aggravating circumstances, and life imprisonment on each count of rape. The trial court ordered that the sentences run concurrently, and the appellant was sentenced to fifteen years on each of count 1 and 4; and to life imprisonment on each of count 3 and 4. Effectively, the accused was sentenced to a life imprisonment. The appeal was directed against sentence.

The core of the appeal was directed at the remarks made by the presiding judge in the trial court when handing down sentence:

'Mr Baloyi and Mr Maluleke, it is clear that there are no substantial and compelling reasons not to impose the minimum sentence, you surely know it yourself. It is not all about raping these women, you also robbed them of their items'. The trial Court further remarked that 'I must tell you that if you pleaded guilty and you were not serving life sentence or 20 years, the mere fact that you pleaded guilty, I would have imposed a lesser sentence, but a lesser term of sentence will not make any difference because you are serving heavier sentences in any case.' [Paragraph 7]

Mdalana-Mayisela AJ (Louw J concurring) held that these statements by the trial court were contradictory as far as the trial court suggested that had the accused pleaded guilty, it would have amounted to substantial and compelling reasons in mitigation. [Paragraph 8]. The imposition of a life sentence on the appellant, similar to the accused 1, amounted to an irregular exercise of discretion. The sentence on life imprisonment on accused 1, blinded the trial court to all considerations in relation to the appellant which entitled the court to interfere with the sentencing. [Paragraph 9]

Mdalana-Mayisela AJ then dealt with the personal circumstances of the appellant and the fact that the appellant pleaded guilty to the charges, without requiring the victims to testify. Other factors taken into account were that the accused was a first offender, his personal circumstances including age, and the retributive, deterrent and preventative aspects of punishment. Mdalana-Mayisela AJ concluded that there were substantial and compelling reasons that warranted a lesser sentence than life imprisonment on counts 3 and 4 since there were prospects for rehabilitation on the appellant. [Paragraphs 10 – 11].

The sentence was set aside, and substituted with a sentence of 25 years' imprisonment on the counts of rape, which was to run concurrently with the sentence imposed on the remaining counts.

DLADLA V S (A139/2016) [2017] ZAGPPHC 821 (20 FEBRUARY 2017)

Case heard 16 February 2017, Judgment delivered 20 February 2017.

The appellant was convicted in the Regional Magistrate Court on six counts of theft, and one count of housebreaking with the intent to steal and theft. and sentenced to an effective term of 20 years' imprisonment. The appeal was against the sentence.

Mdalana-Mayisela AJ (Louw J concurring) reiterated the established principles governing sentencing and pointed out that sentencing is the discretion of the trial court, with the court only interfering if the sentencing is shockingly inappropriate. A mere misdirection was not sufficient to interfere with the trial sentence. Such a misdirection must be of a certain degree to show that the court failed to exercise its discretion.

The court highlighted the objectives of sentencing and stated the following:

"Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when sentence is being imposed. Surely, the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation". [Paragraph 10]

On the argument that the trial court failed to consider the cumulative effect of the sentences imposed, Mdalana-Mayisela AJ held that the trial court had factored in the cumulative effect of the ultimate number of years imposed by ordering some sentences to run concurrently. Whilst there was "no doubt that all the offences … are serious and have to be punished seriously", Mdalana-Mayisela AJ accepted that "they were not of a violent character."

"Clearly he [appellant] committed these offences for his personal gain and financial reasons. The offences committed by the appellant are prevalent in our country and the sentences imposed are justified by the interests of the society. The personal circumstances of the appellant and the direct consequences of the sentences imposed cannot and should not be allowed to outweigh the seriousness of the offences. The effective sentence of twenty (20) years' imprisonment is not disproportionate in the circumstances of this case." [Paragraph 11]

"It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands". [Paragraph 12]

The appeal was dismissed.

MS SHANAAZ MIA

BIOGRAPHICAL INFORMATION

Born: 24 December 1968

BA, University of Cape Town (1989)

LLB, University of Cape Town (1995)

LLM, University of Western Cape (2002)

CAREER PATH

Senior Magistrate (2019 – present)

Magistrate (2003 – 2019)

Acting Judge, Gauteng, Free State, Western Cape, Land Claims Court ("LCC") [

Gauteng High Court (February 2013, April 2014, October – November 2017, February – April 2018, May – June 2018, June 2019)

Free State High Court (April – October 2015)

Western Cape High Court (October – December 2010, January – April 2011)

Land Claims Court (May – October 2009, Decemer 2010).

Acting Magistrate (2002 – 2003)

Advocate, Department of Justice and Correctional Services (1998 – 2002)

Legal Advisor, South Peninsula Municipality (1997 – 1998)

Professional Assistant, Y Ebrahim & Associates (1997)

Public Defender (Attorney), Legal Aid SA (1996 – 1997)

Member, JOASA (2003 –)

South African Chapter, International Association of Women Judges

Vice President, Programmes (2014 – 2016)

International Liaison Officer (2014 – 2016)

Secretary (2007 – 2009)

Founding Member (2004)

NADEL Western Cape

Executive committee (2002)

Management Committee (2002)

Member (2001 – 2002)

SELECTED JUDGMENTS

PRIVATE LAW

PIENAAR V VUKILE PROPERTY FUND (A140/2014) [2015] ZAFSHC 127

Case heard 11 May 2015, Judgment delivered 25 May 2015

This was a delictual claim for the injuries sustained by the plaintiff when she slipped and fell at a shopping centre. The claim was not successful in the court a quo. The main issue before the court on appeal was whether or not the respondent's negligence in not cleaning tiles was the cause of the appellant's falling and injuring herself.

Mia AJ (Van Zyl J concurring) noted that the appellant had elected to claim damages from the respodent, "who would ordinarily not be liable for the negligent acts of the subcontractor it engaged to clean the Centre." [Paragraph 10] Mia AJ held that the respondnet's liability would arise from a breach of its duty to take reasonable steps to prevent injury which it ought to have seen. In this case, "it is evident that the respondent took steps to guard against harm. The respondent appointed a subcontractor to clean the premises and took steps to ensure that the performance of the duty was undertaken and that the necessary care was taken." [Paragraph 12]

Mia AJ held that the evidence led was not sufficient to show that the respondent had failed in its duty to take the necessary care. [Paragraph 13].

"… [O]ne must be mindful of the fact that what is reasonable or which reasonable steps ought to be taken in a given set of circumstances would depend on the facts of the particular case. On the facts of this matter it is clear that the respondent took all reasonable steps to ensure that the tiles were clean and not slippery. The Court a quo's finding that the respondent did what was required of it and that it was not necessary to do more than what it had done, is unassailable. The Court a quo's finding that the appellant did not succeed in showing that the respondent was negligent is in my view correct." [Paragraph 14]

The appeal was dismissed with costs.

SOCIO – ECONOMIC RIGHTS

BAPHIRING COMMUNITY V UYS AND OTHERS 2010 (3) SA 130 (LCC)

Case heard 24 – 28 August 2009; 1 December 2009, Judgment delivered 19 January 2010

This case dealt with a claim for restitution in terms of the Restitution of Land Rights Act. The claimant proposed to hold the land through a communal property association to which all the community members would be allowed to join. The main issue was whether the restoration would be feasible and equitable in terms of s 33 of the Act.

Mia AJ (Gildenhuys J and M Wiechers (assessor) concurring) held that the affected land was use for agricultural cultivation, and carried an estimated value of R70 million. The difference in the value of the land between the time of dispossession and the present value was "considerable".

" Expropriation of the land in order to restore it to the Baphiring community will, in addition, require the current landowners to be compensated for financial loss they may suffer as result of the expropriation, which will increase the costs to the fiscus of acquiring the land in order to restore it to the claimant community." [Paragraph 18].

"The lack of support and resources for relocation to the old Mabaalstat, as well as the circumstances of the claimant community at the new Mabaalstat, weighs against relocating the Baphiring community to the old Mabaalstat. It appears that, if relocated, community members would be forced to downgrade their living space." [Paragraph 26]

"The evidence is that not all of the community members will want to move. It is not clear at this stage how many families will move and how many new homes will be required to be built. … Resources, in terms of expertise and financial assistance, are necessary, but lacking in the present case. This impacts negatively on the community's intended use of the land and the feasibility of restoration." [Paragraph 28]

"There are graves of the Baphiring tribe on several of the portions of the farm Rosmincol. … The claimants request restoration of the land housing the gravesites in the event that it is found that restoration is not feasible. The respondents indicated that they had no objection to such restoration." [Paragraph 30]

Mia AJ held that, considering the evidence, restoration was not feasibile. However, the restoration of the gravesites of the claimant community was feasible, and the manner of that restoration was to be determined in a subsequent hearing. Furthermore, the community were entitled to equitable redress, the form and extent of which was also to be determined in a subsequent hearing. No order was made as to costs. [Paragraph 31].

The decision was overturned on appeal in Baphiring Community and Others v Tshwaranani Projects CC and Others 2014 (1) SA 330 (SCA). The SCA held that whilst the Land Claims Court had been correct to take the cost implications of restoration into account, it was hamstrung by inadequate evidence on the issue. This meant it could not determine the question of feasibility conclusively, and ought to have ordered the state to lead further evidence. The case was remitted to the Land Claims Court.

CRIMINAL JUSTICE

DAVIDS V S (A 181/2010) [2010] ZAWCHC 232 (22 OCTOBER 2010)

The appellant was convicted of murder and attempted murder, and argued on appeal against sentence that the court a quo had erred in overemphasising the seriousness of the crime and underemphasising the personal circumstances of the appellant. Secondly, he argued that the trial court underemphasised that the appellant was young when the offence was committed.

Mia AJ (Hlophe JP and Ndita J concurring) noted that the appellant was a repeat offender, and despite the postponement of his earlier punishment and a referral to a social worker to participate in

rehabilitation programmes, "the appellant went on to commit at least six more offences." [Paragraphs 9 – 10].

"…The appellant has also not utilized the numerous opportunities he had when his sentence was suspended to change his behaviour. Having regard to the previous offences, the offences in casu, have increased in gravity and the consequences for the community have become dire with the passage of time." [Paragraph 11]

"The Probation Officer mentions in the report that the parents of the appellant have a history of alcohol abuse and family violence. … The appellant was exposed to life skills programmes when his first sentence was postponed. It appears that the opportunity to learn life skills was presented at an early age and before he progressed to further crimes." [Paragraph 13]

Mia AJ held that there was no basis on which to interfere with the sentence, and the appeal was therefore dismissed.

CHILDRENS' RIGHTS

MULDER V MULDER (A275/2010) [2011] ZAWCHC 122

Judgment delivered 01 February 2011

This was an appeal against the decision of a Magistrate to increase the maintenance of the respondent and the minor child from R2 000.00 per month each to R7 000.00 per month each. Central to the appeal was the question of whether the Magistrate had misdirected herself in assessing the new maintenance payable.

Mia AJ (Le Grange J concurring) held:

"… [T]he appellant responded to questions with great reluctance and on occasion indicated that he did not wish to respond to questions. He informed the Court a quo that he did not wish to support his ex-wife and would support his daughter if she lived with him. …."

Mia AJ found that there was no basis for the complaint that the court a quo had failed to take information into account. [Paragraph 10]

"The appellant did not challenge the cost of maintenance of the minor child nor did he indicate that the requirements of the applicant were unreasonable or that they were not supported by the evidence tendered. …" [Paragraph 13]

"There is no glaring misdirection in the magistrate's calculation of the appellant's approximate income. The appellant's complaint that the bank statements were outdated ignores that he was the author of such circumstance. It appears that a court order was required before the appellant furnished any information regarding his income. Nothing prevented the appellant from furnishing his updated bank statements during the enquiry or indicating what he financial position was." [Paragraph 14]

"The submission on behalf of the appellant that the magistrate accepted that "he had lots of debt" and therefore the appeal should succeed has no basis in law … It is trite that the interests of the minor child,

in this instance the maintenance of the minor enjoys greater priority than the appellant's creditors." [Paragraph 15]

"The record does not indicate that the applicant and minor child's expenses are beyond the applicant's ability ..." [Paragraph 16]

"On a conspectus of the evidence I am satisfied that the appellant has sufficient funds available to satisfy his maintenance obligation. The Court a quo did not misdirect itself on this issue. There is therefore no substance in the complaint that the Court a quo did not take into account his current financial position." [Paragraph 20]

The appeal was dismissed with costs.

MR. ANTHONY MILLAR

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 25 June 1969

BA, University of the Witwatersrand (1990)

LLB, University of the Witwatersrand (1993)

CAREER PATH

Acting Judge, Gauteng High Court (August – September 2017; January – February 2018; March 2018; April – May 2018; July – August 2018; September – November 2018; January – May 2019)

Norman Berger Attorneys

Director (2000 –)

Partner (1998 – 2000)

Attorney (1995 – 1998)

Candidate Attorney (1992 – 1995)

Council Member, Legal Practice Council (2018 –)

Board Member, Legal Practitioners Fidelity Fund (2016 – 2018)

Council Member, Law Society of South Africa (2016 – 2019)

Law Society of the Northern Provinces

President (2015 – 2017)

Councillor (2015 – 2018)

Chairman of Advisory Board, Small Claims Court for the District of Randburg (2008 –)

Commissioner, Small Claims Court (2002 –)

Member, Black Lawyers Association	(1999 – 2015)
Member, Johannesburg Attorneys Association	(1993 –)

SELECTED JUDGMENTS

PRIVATE LAW

LDB V ROAD ACCIDENT FUND 2018 JDR 0112 (GP)

Case heard 31 January, 1 February 2018, Judgment delivered 5 February 2018

The Plaintiff brought an action for damages for loss of support arising out of the death of her late husband, as a result of injuries sustained by him in a motor vehicle collision. The issue was whether the plaintiff's minor child was entitled to claim a loss of support and the quantum in respect of such claims for which the Defendant was liable. The minor child was not the biological child of the deceased.

Millar AJ held that the marriage with the Plaintiff only strengthened the obligation to support the minor child even though the marriage had only lasted for five months. [Paragraphs 12-14] Furthermore, Millar AJ held that there was no limitation on the number of different persons who may contribute to the maintenance and support of another:

> "The fact that a biological parent has a duty, to support a child, which arises *ex lege,* does not preclude or exclude support of the child by others. It is self-evident that such a situation which will necessarily result in a child's needs being better met, is in the bests interests of the child." [para 15]

Millar AJ concluded that the deceased had undertaken a duty to support the minor child, and that the Defendant was therefore liable to compensate the child. [Paragraph 16]

Millar AJ accepted the agreed deduction of a five and 15 percent contingency for the general hazards of life in respect of the past and future loss respectively as agreed by the parties. [Paragraph 38]

MAROPE V MINISTER OF POLICE 2018 JDR 0503 (GP)

Case heard 12, 13 and 14 February 2018, Judgment delivered 14 February 2018

Plaintiff brought an action for damages against the defendant arising from alleged unlawful arrest and detention. The plaintiff was a Warrant Officer who had served in the police for 17 years.

After noting out that the plaintiff had been arrested without a warrant, Millar AJ turned to section 40(1)(b) of the Criminal Procedure Act and applied the reasonable ground test from *Mabona and Another v Minister of Law and Order*. Millar AJ concluded that the arresting officer did not act upon

reasonable grounds since the officer in question did not make any attempt to verify information on the computer system. Millar AJ therefore held that further enquiries were required ,and that the arrest and detention of the plaintiff had been unlawful. [paras 24-25]

With respect to the quantum of damages, Millar AJ applied the approach from *Mbanjwa v Minister of Police* and found that the distinguishing feature in the case was that the plaintiff was a police office who besides having been incarcerated in uniform, had been previously been based at the station concerned. [Paragraph 27] Based on the circumstances of this case, Millar AJ quantified the damages at R 275 000,00. [Paragraph 29].

THWALA V THE MINISTER OF POLICE 2018 AND ANOTHER JDR 1281 (GP)

Case heard 3, 6 August 2018, Judgment delivered 8 August 2018

The plaintiff instituted an action against the defendants for damages suffered as a result of an alleged unlawful arrest and subsequent malicious prosecution. The court therefore had to decide whether the arrest was unlawful, and whether the discretion to arrest had been properly exercised.

Millar AJ found that there had been a lawful arrest warrant, and focused on the question whether the discretion to arrest had been properly exercised. With reference to *Weitz v Minister of Safety and Security and Others*, Millar AJ analysed the evidence which was at disposal at the material time and concluded that the officer in charge had exercised his discretion properly. [Paragraphs 18-21]. Therefore, the court dismissed the claim with regard to the unlawful arrest against the first defendant.

With reference to *Minister of Police and Another v Du Plessis*, Millar AJ held that there was no reasonable prospect to secure a conviction on the part of the second defendant, the National Director of Public Prosecutions. [Paragraph 25] Millar AJ based this conclusion on the testimony of the relevant Public Prosecutor, who conceded under cross-examination that at the close of the state's case in the criminal proceedings, he had informed the court that he had no basis to oppose the application by the plaintiff for a discharge. [Paragraphs 7, 27] Millar AJ therefore found the second defendant liable for such damages as the plaintiff might prove.

CIVIL PROCEDURE

MERE V MERE AND OTHERS [2019] ZAGPPHC 90 (26 MARCH 2019)

Case heard 28 January 2019, Order made 28 January 2019, Reasons delivered 26 March 2019.

After the order of 28 January, Applicant applied for reasons. The court file had been misplaced, and it was only when a duplicate file was opened on 22 March 2019 that Millar AH was in a position to prepare the reasons. The applicant had sought an order to re-open a deceased estate, and declare any liquidation and distribution accounts null and void. The application was postponed due to non-joinder and issues relating to the valuations of the properties in the estate being outdated. [Paragraphs 1 – 4]

Millar AJ addressed the conduct of the Applicant and his *pro bono* legal representative, and pointed out that while the Applicant was represented *pro bono* by his attorneys, the 1st and 2nd Respondents were not.

> "They [1st and 2nd Respondent] have been put to the expense of having to defend themselves against the relentless pursuit by the Applicant of the re-opening of the estate of the deceased. They have not had the privilege of *pro bono* legal assistance." [Paragrph 13]

Millar AJ criticised the Applicant and his attorney for setting the application down for hearing even though there was a material non-joinder of parties:

> "It is for this reason that … the Applicant was to bear the wasted costs. Having regard to the length of time that the Applicant has pursued this application, the fact that the application is subject to the short comings that it is and that the Respondents were needlessly brought to Court and caused to incur the expenses for doing so, I formed the view that the Applicant ought not to be permitted to re-enroll this particular application until such time as the wasted costs have been paid. In this regard I was mindful of not only the right of the Applicant to have his case heard but also the right of the 1st and 2nd Respondents not to be put to unnecessary and avoidable expense." [Paragraph 17]

Millar AJ remarked that acting for a *pro bono* client would not absolve applicants' of the obligation to provide a professional service to the Applicant and to ensure that their conduct in providing that service does not amount to an abuse of any other party or for that matter the Court. [para 18]

CRIMINAL JUSTICE

SEBOE V STATE 2018 JDR 0227 GP

Case heard 4 September 2017, Judgment delivered 8 September 2017

The appellant was convicted in the Regional Court Pretoria of premeditated murder (count 1), unlawful possession of a firearm (count 2) and unlawful possession of ammunition (count 3). He was sentenced to life imprisonment for the premeditated murder and to 15 years imprisonment for count 2 and one year for count 3. The sentences for count 2 and 3 were to run concurrently with that for murder. The appeal was against conviction and sentence.

Millar AJ (Mothle J concurring) confirmed the conviction. Regarding the sentence for counts 1, 2 and 3. Millar AJ held that while the appellant had a previous conviction for domestic violence three years previously, that would not be indicative that the appellant was inherently violent or posed an ongoing danger to the community. Millar AJ found that the appellant was clearly unable to control his anger, which was considered as a reason for this and the prior conviction. [Paragraph 28]

Regarding the rehabilitation of the appellant, Millar AJ concluded that it was unlikely that the appellant would commit any further violent crimes if he attended a course, or at least that the possibility of him doing so would be minimized. [Paragraph 29] Against this backdrop, Millar AJ concluded that the trial court had overemphasized the interest of the community and was "dismissive" of the personal circumstances of the appellant. Millar AJ further noted that the State did not lead any evidence in the trial with respect to aggravation by the family of the deceased, and therefore did not provide the court a quo with a greater insight into the interest of the specific community where the crime occurred. [Paragraph 30]

Millar AJ therefore concluded that there were "substantial and compelling reasons for the court to have departed from the minimum sentence in respect of count 1 and it should have done so." [Paragraph 31] The appeal against sentence on count 2 was upheld, and the sentence replaced with a sentence of 10 years imprisonment. The appeal against sentence on count 1 was upheld, and the sentence replaced with a sentence of 25 years imprisonment, of which 5 years were suspended on the condition that the appellant completed an anger management course and did not commit an offence of which violence is an element during the period of suspension. [Paragraph 34]

MEDIA COVERAGE

Remarks quoted at the Black Lawyers' Association Annual General Meeting in 2018:

"Attorney Anthony Millar noted that fusion would bring advocates closer to clients, which is necessary. Mr Millar said that the direct consequence of fusion would be greater access to justice for the public. He added that fusion would also lead towards a unified legal profession. 'The name advocate is a job description and does not mean that advocates are better than attorneys. When cases are presented in court, the public sees advocates as the face of the profession while attorneys are viewed as the poor cousins. We need to change this,' he said."

- Mapula Sedutla, "BLA AGM: Fusion is the way to go"", *De Rebus* 1 February 2019 (Available at http://www.derebus.org.za/bla-agm-fusion-is-the-way-to-go/)

Report of Law Society dismissing complaint of unprofessional conduct against the candidate:

"The Law Society of the Northern Provinces has dismissed a complaint of unprofessional conduct against an attorney whose client earlier this year successfully challenged the fees she was charged by Bobroff & Partners for a Road Accident Fund (RAF) case."

"The Law Society confirmed that this week it held an inquiry into the complaint of touting laid against Anthony Millar, a partner at Norman Berger & Partners, and concluded there was no evidence of unprofessional conduct. … he complaint was laid against Millar last year by the South African Association of Personal Injury Lawyers (Saapil). Ronald Bobroff is the president of Saapil, and Saapil also last year lodged a counter-application in the fee case that Millar's client brought against Bobroff."

"Millar this week asked the Law Society to dismiss the touting complaint, saying it was motivated by malice and spite, because Millar's clients have brought cases against Bobroff's firm."

- Laura du Preez, "Complaint against Lawyer who challenged high fees dismissed", *IOL*, 9 June 2013 (Available at https://www.iol.co.za/personal-finance/complaint-against-lawyer-who-challenged-high-fees-dismissed-1529227)

ADVOCATE CASSIM MOOSA

BIOGRAPHICAL INFORMATION

Born: 19 June 1965

BA, University of Durban Westville	(1990)
LLB, University of Durban Westville	(1990)
Certificate for Prosecutors, Justice College	(1991)
Certificate for Direct Marketing, Damelin	(1996)
Diploma, Alternative Dispute Resolution, University of Pretoria	(2005)
Certificate, Labour Arbitration, AFSA	(2005)
Certificate, Divorce Mediation, AFSA	(2005)
Post Grad. Diploma in Labour Law, University of Johannesburg	(2006)
Certificate in Conveyancing Practice, LEAD	(2008)

CAREER PATH

Acting Judge, Gauteng High Court (July – September 2015; October – December 2015; January – April; May, June, July, August, September, October – December 2016; January – December 2017; January – February 2018; April 2018; July – December 2018; February – June 2019)

Advocate of the High Court of South Africa	(1993 –)
Legal Consultant, City of Johannesburg	(2001 – 2006)
State Advocate, Department of Justice	(1992 – 1996)
State Prosecutor, Department of Justice	(1988 – 1992)

Instructor, Practice Management, LEAD (2012 – 2016)

Prosecutor, Student Disciplinary Committee,

University of Johannesburg (2004 – 2006)

Part-time Lecturer, Institute of Active Learning (1996 – 1998)

Magistrates' Commission (2013 – present)

Commissioner

Member, Legislative Committee

Chairperson, Ethics Committee

Member, EXCO

Spokesperson

Member, NADEL (2013 – 2016)

Instructor, Law Society of South Africa (2012 – 2016)

Member, Provincial Coordinator,

National Bar Council of South Africa (2009)

SELECTED JUDGMENTS

PRIVATE LAW

MHLANGA V MINISTER OF POLICE (41410/2010) [2018] ZAGPJHC 46 (16 FEBRUARY 2018)

Case heard 16, 17, 20, 21, 23, 27 February 2017, Judgment delivered 16 February 2018

The plaintiff sued damages as a result of an incident when members of the South African Police Services arrested the Plaintiff without a warrant. The Court, therefore, had to decide whether the arrest and subsequent detention was unlawful. The plaintiff further claimed damages for the alleged unlawful arrest and detention.

Based on section 40(1) of the Criminal Procedure Act, *Minister of Safety and Security v Kleinhans 2014 (1) SACR 613 (WCC) and Minister of Safety and Security v Sehoto & Another 2011 (1) SACR 315 (SCA),* Moosa AJ identified factors that must be present for an officer to effect an arrest without a warrant:

> "(1) The jurisdictional prerequisites for S 40(1) must be present;
>
> (2) the arrestor must be aware that he or she has a discretion to arrest;
>
> (3) the arrestor must exercise that discretion with reference to the facts
>
> (4) there is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court." [Paragraph 24]

Based on this approach, Moosa AJ found that selling liquor with licence constituted an offence under section 154 (1)(a) of the Liquor Act, and therefore concluded that the arrest was lawful. [Paragraphs 27 - 31].

"What is more telling and in my view the death knell of the Plaintiff's case is the fact that she paid an admission of guilt; which she vehemently denies. It begs the question as to who would be so magnanimous to pay an admission of guilt on behalf of the Plaintiff, in order to secure her release from custody .." [Paragraph 29].

ADMIRE V THE MINISTER OF SAFETY AND SECURITY, UNREPORTED JUDGMENT, CASE NUMBER: 62343/2011 (GAUTENG HIGH COURT, PRETORIA)

Case heard 7, 9 and 10 May 2019, Judgment delivered 28 May 2019.

Plaintiff claimed delictual damages resulting from an alleged unlawful arrest and detention, as well as an alleged assault by the member of the South African Police Services. Moosa AJ held that:

> "It is trite law that the Defendant bears the onus of proof regarding the lawfulness of the arrest. … It is trite that when a court is confronted with two mutually destructive versions, the proper approach would be for the court to consider the aspects of reliability, credibility, as well as the probabilities of the evidence given by the witnesses." [Paragraphs 37-38]

On the basis of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Another* and *Minister of Safety and Security v Sehoto and Another (1) SACR 315 (SCA)*, Moosa AJ concluded that the plaintiff failed to challenge the evidence regarding the exercise of discretion by the arresting officer at the time of arrest. [Paragraph 46] Therefore, Moosa AJ concluded that the arrest was lawful. He based his conclusion on his assessment that the witness of the defendant was reliable and credible, whereby the plaintiff and his witness did not make a good impression on the court – it "cannot be believed" and "cannot pass muster." [Paragraph 48]. Moosa AJ dismissed the claim with costs.

CRIMINAL JUSTICE

IONNAIDES V S (SH 363/2014, SA 8/2018. A18/2018) [2019] ZAGPPHC 280 (3 JUNE 2019)

Case heard 29 May 2019, Judgment delivered 3 June 2019

This was an appeal against the effective sentence of 20 years imprisonment. The Court granted leave to appeal for count 1 – rape of a minor child during the period between 2003 – 2005 (15 years' imprisonment); count 3 – child abuse (5 years imprisonment); count 4 – crimen injuria (5 years imprisonment). The appellant was 75 years old when he was sentenced.

Moosa AJ (Makhubele J concurring) described the circumstances under which a court of appeal might interfere in the sentencing discretion of a lower court. Based on S v Hewitt 2017 (1) SACR 309 SCA which states that age can be a mitigating factor, Moosa AJ concluded that the court a quo did exercise its discretion correctly by deviating from the imposition of the prescribed minimum

sentence for the count 1 – rape of a minor. [Paragraph 9]. With regards to count 3 – child abuse, Moosa AJ also upheld the findings of the court a quo. [Paragraph 10]

Moosa AJ then focused on the order by the court a quo that the sentences run concurrently. Based on *S v Munyai 1993 (1) SACR 252 (A), S v Skenjana 1985 (3) SA 51 (1), S v Barendse 2010 (2) SACR 616 ECG* and section 12(1) of the Constitution, Moosa AJ concluded that:

> "[T]he court a quo misdirected itself and thereby caused a disparity between the sentence imposed and the sentence that is proportional to all the relevant facts. It is that the effective sentence of 20 ears imposed would extend beyond the appellant's natural life expectancy and therefore the sentence is shockingly inappropriate. Further, I am of the view that the sentence is vitiated by misdirection, is disturbingly inappropriate, cruel and inhuman." [Paragraph 18]

The Court dismissed the appeal against the sentence on count 1 ,and upheld the appeal against the sentence on count 3. Moosa AJ ordered that the sentence on count 3 run concurrently with the sentence on count 1. The appellant would therefore serve a sentence of 15 years imprisonment.

S V LEBOGANG, JUDGMENT ON SENTENCE, UNREPORTED JUDGMENT, CASE NUMBER SS 052/2018 (GAUTENG HIGH COURT, JOHANNESBURG)

Case heard 8, 9, 11, 12, 15, 16 October and 5, 9, 22 November 2018, Judgment delivered 22 November 2018.

The accused pleaded guilty on 50 counts, including rape (13 counts), robbery with aggravating circumstances, kidnapping and sexual assault. The accused was a taxi driver who kidnapped, raped and sexually assaulted passengers.

After noting the seriousness of the crimes committed, Moosa AJ addressed the issue of mercy as "a component of justice." Moosa AJ cited the judments of *S v Rabie* and *S v SMM,* and concluded that sentencing is generally a matter of discretion left in the hands of the court [Paragraphs 26 – 27]. Moosa AJ held that:

> "The discretion, however, may not be exercised arbitrarily, but reasonably and judicially within the parameters of legislative prescription. Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be retribution and deterrence. Retribution may even be decisive" [Paragraph 28]

Moosa AJ pointed out that the level of crime in society had reached alarming proportions in the society, and found that the accused's abuse of the "pivotal role" of taxis in society constituted an aggravating factor. [Paragraphs 30, 40] After an analysis of the aggravating and mitigating factors, Moosa AJ did not find any compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment. [Paragraph 50] The accused was sentenced to an effective term of life imprisonment, and ordered to accused to participate in "sex offender programmes offered by the Department of Correctional Services." [Paragraph 63].

KHOZA V S, UNREPORTED JUDGMENT, CASE NUMBER: SS 142 2014 (GAUTENG HIGH COURT,

Case heard 23 May 2019, Judgment delivered 5 June 2019

The appellant had been convicted in the regional court inter alia of rape, and was sentenced to life imprisonment. [para 1] With reference *S v Shackell, S v Molomi and S v Hanekom*, Moosa AJ (Adams J concurring) set out the test for reasonable doubt, and related evidentiary requirements. [Paragraphs 35-37] On this basis, Moosa AJ concluded that:

> "… I am simply unable to place any reliance upon the veracity of the complainant's evidence. On the available evidence, I am of the view that there is a reasonable possibility that the complainant was involved in some form of coitus with someone else prior to her meeting the appellant; and due to the difficult circumstances that she found herself in, both with the police and her family decided to extricate herself from the situation by falsely implicating the appellant." [Paragraph 38]

Moosa AJ held that "the court a quo had misdirected itself in accepting the evidence of the complainant as being satisfactory in all material respects and rejecting and finding that the evidence of the appellant as beyond false, and riddled with improbabilities." [Paragraph 39] Moosa AJ held that the State failed to prove the guilt beyond reasonable doubt, upheld the appeal, and set the convictions and sentences aside.

MR MARCUS SENYATSI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 14 April 1959

B Proc, University of Limpopo (1984)

LLB, University of Limpopo (1989)

CAREER PATH

Acting Judge, Gauteng and Mpumalanga High Courts (October – November 2016; February – March, July – September, October, November – December 2017; April – June, November - December 2018, January – February, March, April - June 2019)

Legal Manager, Industrial Development Corporation (2009 - 2018)

Sole practitioner, Marcus Senyatsi Attorneys (2008 - 2009)

Executive Manager, South African Airways (2001 - 2008)

Senior Legal Advisor, Nampak Ltd (1999 - 2001)

Senior Associate, Deneys Reitz Inc attorneys (1997 - 1999)

Partner, Senyatsi Molepo and Ramotshela Attorneys (1994 - 1997)

Part – time lecturer, University of Limpopo (1990 - 1995)

Sole practitioner, M.L Senyatsi Attorneys (1993 - 1994)

Attorney, Meyer Pratt and Luyt (1992 - 1993)

Candidate Attorney, Meyer Pratt and Luyt (1990 - 1992)

Legal Advisor, Lebowa Development Corp. Ltd (1984 - 1989)

Member:

- Corporate Lawyers' Association of South Africa (2009 -)
- Law Society of the Northern Provinces (1992 -)
- Black Lawyers' Association (1990 – 2001)
- Association of Legal Advisors of South Africa (1984 – 1989)

Member, African National Congress (1999 – 2012)

SELECTED JUDGMENTS

PRIVATE LAW

STIRLING V FAIRGROVE (PTY) LTD AND OTHERS 2018 (2) SA 469 (GJ)

Case heard 6 September 2017, Judgment delivered 6 September 2017

This was an application for a declaratory order that the applicant was still the owner of immovable property known as Erf 85, Hurlingham Town, Johannesburg. The applicant further sought the expungement of two deeds of transfer in terms of which Erf 85 was first transferred to the third respondent (Alvares), who in turn transferred it to the first respondent (Fairgrove). The property was fraudulently sold without the consent of the owner. Fairgrove brought a counter-application for damages for the monies paid to Alvares and SARS. Alvares brought a claim against the alleged estate agent and a property company, which was consolidated into these proceedings.

Senyatsi AJ held:

"It is … clear that the Act confers upon the Registrar [of Deeds] significant powers and responsibilities to ensure the proper administration of the land registration system in South Africa. The Registrar occupies an important oversight role that requires her and the officials in her employment to scrutinise the documents placed before them… As stated herein-before it is clear that protection of land owners through security of title is a critical role played by the Registrar and her staff" [Paragraph 45]

"One critical aspect of the process of deed execution is to thoroughly examine all deeds presented before the Registrar by her staff. … This in my view is to ensure that all formal requirements are applied with. In so doing, the Registrar relies on the conveyancers." [Paragraph 46]

"I have seen from the Registrar's answering affidavit that while the Registrar may call for proof of these facts, proof will normally not be required of facts for which the conveyancer must accept responsibility unless the deed or document is obviously faulty. It is therefore understandable that the relationship between the Registrar and conveyancer is based on trust. That trust is premised on the fact that the conveyancer is indeed registered as such in terms of the law." [Paragraph 53]

"Notwithstanding the fact that Kekana is not a conveyancer, he signed preparation certificates not one but three separate documents, which were required to be certified by a conveyancer, namely the first power of attorney, the Regulation 68 affidavit and Deed of Transfer T54404/15. He also appeared before the Registrar to execute Deed of Transfer T54404/15. Since Kekana was not a registered conveyancer, he was not authorised to sign any of the documents he signed or to appear before the Registrar. That called for the rejection of the deed which the Registrar failed to do." [Paragraph 73]

"It is clear to me that the staff of the Registrar did not check if Kekana's name was on the register of conveyancers. They did not also properly examine the deed of transfer and the preparation certificate because if they had done so, they would have identified the numerous obvious errors there and rejected the deed or even investigate whether the preparer of the preparation certificate was a qualified conveyancer." [Paragraph 78]

"It is common cause that transfer to Alvares was done fraudulently. The registrar, as the custodian of security of title to property, breached her statutory duty to reject the deed. All the facts were before her

to do so, but her staff responded negligently to stop it. The subsequent transfer from Alvares to Fairgrove was effected procedurally correctly and I have not been asked to make a finding on it. The first fraudulent transfer and registration of ownership to Alvares were direct consequences of the negligence of the registrar. The registrar ought to have reasonably foreseen that losses were likely to be suffered as a direct consequence of her negligence. …" [Paragraph 87]

The applicant was declared the lawful owner of the Erf. Second and third respondent were ordered to pay damages to the first respondent.

MOJAPELO T/A JIKELEZA TAVERN V MINISTER OF SAFETY AND SECURITY AND ANOTHER (66553/13) [2018] ZAGPPHC 270 (26 JANUARY 2018)

Case heard 26 January 2018, judgment delivered 26 January 2018

This was a claim for damages arising out of allegations made by the police that the Plaintiff kept a human skeleton and an unlicensed firearm at his property. As a result of the allegations, the plaintiff argued that his safety was endangered in his community, and he was forced to relocate and to purchase another property.

Senyatsi AJ held:

"In my view the Plaintiff is entitled to a substantial damages award. He had to relocate his family from Siyabuswa as the insult was potentially endangering his live. We know in the Republic that someone accused of keeping for instance human skeleton at his house in some communities may be associated with the practice of witchcraft which may lead to such person being killed. This is why our law has made it a criminal offence to accuse any one of witchcraft. The injury suffered as a result of such accusation by the second defendant is understandable and cannot be under estimated." Paragraph 16]

The defendants were ordered to pay the plaintiff R850 000.00, and the costs of the lawsuit.

MONGATANE V PASSENGER RAIL AGENCY SOUTH AFRICA 2017 JDR 0323 (GP)

Case heard November 2016, Judgment delivered 22 February 2017

This was a claim for R2 million in damages which arose from the injuries sustained by the by the plaintiff as a result of allegedly being pushed out of a train. The court had to decide on whether or not the defendant owed duty of care to the plaintiff, and whether the defendant failed to take reasonable steps to ensure the safety of the plaintiff as a passenger in the train.

Senyatsi AJ held:

"It can never be argued in general that the defendant, as a commuter rail carrier of passengers owes the duty of care towards its passengers to ensure that their safety is guaranteed when boarding its trains." [Paragraph 57]

"That duty of care would include ensuring that the coaches of its trains are not over crowded." [Paragraph 58]

"The court is not persuaded by the evidence of the train guard Mr Mashaba as to the volume of passengers in the coaches as he sat at the last coach of the train and was not, in my view, able to see the extent of volume of the passengers in the coaches. He was at pains to show that the train was carrying a normal volume of passengers and that as train guard; he had never seen a full train with passengers hanging on the doors. I am not convinced by his evidence on that assertion." [Paragraph 64]

"The case pleaded in the particulars of claim is that the plaintiff was pushed as she was disembarking the train and fell as the train was leaving the platform but in her reply to further particulars to the defendant, the incident took place whilst she was seated." [Paragraph 66]

"The evidence adduced by the plaintiff as to the reason for her fall, is not supported by any documentary evidence. On the contrary, the hospital records stated that the plaintiff advised that she slipped and fell due to the shoes was wearing. The hospital personnel had not reason to record the information as such and did so on the strength of what the plaintiff told them." [Paragraph 69]

"As a consequence of these material contradictions and failure to allege a consistent concise statement of her case in the particulars of claim, the Court is not persuaded that the plaintiff has discharged her onus to prove her case on the balance of probabilities that she was pushed from an overcrowded train and sustained injuries as a result." [Paragraph 71]

The claim was dismissed with costs.

CRIMINAL JUSTICE

NGWENYA V S (A573/17) [2017] ZAGPPHC 898 (14 DECEMBER 2017)

Case heard 14 December 2017, Judgment delivered 14 December 2017.

This was an appeal against a decision of the magistrates' court to deny bail to the appellant.

Senyatsi AJ held:

"The approach to bail by the court must be considered with the elements of the Constitution of the Republic. Section 35(1)(b) of the Constitution provides for a judicial evaluation of different factors that make up the criteria of the interest of justice. It is without doubt, important for judicial officers considering bail applications to harmonise Section 60(11) of the CPA with constitutional norms and imperatives." [Paragraph 9]

"As a consequence, the purpose of bail is to strike a balance between the interests of society and liberty of an accuse person. The basic objectives of bail, is to give effect to personal liberty in accordance with norm of the Bill of Rights enshrined in our Constitution." [Paragraph 10]

"The presiding Magistrate overemphasised the interest of justice and completely overlooked the spirit of the presumption of the innocent enshrined in our Bill of Rights in rejecting the bail application by the appellant. The court a quo was incorrect to refuse that although personal circumstances of the appellant were not disputed and that the State offered to rebuttal thereof, to find that the sworn statement was not sufficient to discharge the onus of exceptional circumstances justifying the release of the appellant on bail." [Paragraph 14]

"What was not disputed was that the appellant had a fixed residential and employment address. He was working for Eskom as a technician and lived in Springs with his family in a house worth R1 500 000,00. He was not a flight risk." [Paragraph 15]

"I do not agree with the finding by the learned magistrate that the likelihood existed that the appellant would attempt to evade his trial. There was no evidence before the court a quo to reach that conclusion. …." [Paragraph 16]

The court ordered the appellant to be released on bail, subject to conditions.

CHETTY AND OTHERS V S (A268/2015) [2016] ZAGPPHC 1165 (26 OCTOBER 2016)

This was an appeal by three appellants against a sentence of direct imprisonment for assault with intent to do grievous bodily harm. The appellants argued that the trial court should have ignored the J88 form as it did not comply with the provisions of section 212(4) of the CPA.

Senyatsi AJ held:

"A document purporting to be an affidavit or a certificate must have been prepared and the original thereof must be submitted to court. The person who made the affidavit (or certificate) must, at the stage when the examination was conducted or process followed, have been in the service of the state; in the service of a provincial administration; in the service of the of or attached to the South African Institute for Medical Research, in the service attached to any university in the Republic, or in the service of or attached to anybody designated by Minister of Justice for the purposes of subsection 212(4) of the criminal procedure Act, 1977 by notice in the *Government Gazette* and this fact must be alleged explicitly in the affidavit (or certificate)." [Paragraph 12]

"Evidence indicating that a factual finding was made by the deponent is allowed by section 212(4) but a fact must have been established by the deponent and such factual finding must be mentioned in the statement. Many section 212(4) statements received from state laboratories … currently express the conclusions of the deponents. Such conclusions indicate that the deponent formed an opinion with regards his/her analysis. Such opinion evidence is not sanctioned by section 212(4) and prosecutors and magistrates should resist the temptation to receive such statements. In cases where it is clear that the factual findings were not made by the deponent, *viva voce* evidence should be presented to prove the point in dispute. Many J88 forms, which can legally be submitted to a court in terms of section 212(4), not only mention the factual findings made by the medical practitioner … but, in cases of murder or culpable homicide, also contains the conclusion (or opinion) what the cause of death was. Such conclusion or opinion is, as was indicated above, not admissible in terms of the section 212(4) statement. If the cause of the death is in dispute in a particular matter, *viva voce* evidence should be preferably be presented to prove such." [Paragraph 14]

"In this case, there is no doubt that the elements of assault with the intent to do gross bodily harm were established by the admissions made by the appellants in their statements made in terms of the plea of guilty." [Paragraph 20]

"The intention of the legislature is clearly to ensure that production of evidence of a fact required to be proven by an expert is simplified by the certificate or the J88 form." [Paragraph 24]

"In proving such a fact intended in the section, the expert must be in the employment of the State or any organ referred to in section 212(4) of the CPA." [Paragraph 25]

"It is undisputed that Dr. I.R. Van der Merwe was neither in the employ of the State nor was he or she designated by the Minister when he or she completed the J88 form as contemplated in section 212(4)(iv) of the CPA." [Paragraph 26]

"As a consequence, the finding made by the trial court in determining the appropriate sentence, was based on a flawed certificate purported to be a J88. This in my view, constitutes irregularity and the appellants were prejudiced when their sentence was considered." [Paragraph 27]

"The trial court has failed to provide reasons as to what factors it took into account when imposing the non - parole order of six months." [Para 38]

The appeal against the sentence was upheld, and the non-parole order of the trial court was set aside. The trial court's sentence of three years imprisonment was substituted with one year's imprisonment wholly suspended for three years on condition that the appellants were not found guilty of a similar offence.

ADMINISTRATION OF JUSTICE

The application form discloses a caution for the late return of a trust account financial statement.

MEDIA COVERAGE

Reported to have been identified in a search warrant for the seizure of documents from a "high-profile liquidator best known for administering the Pamodzi gold mines":

"Another person targeted in the warrant without any further explanation is Marcus Senyatsi, the former manager of legal services at the Industrial Development Corporation (IDC).

The master of the court's office is responsible for maintaining the panel of people who are eligible to be liquidators, and it appoints liquidators to estates.

While the IDC has been a creditor in estates administrered by Engelbrecht, it told City Press that Senyatsi has never acted as its representative in such a liquidation. It added that it was unaware of the warrant until City Press provided it with a copy."

- Dewald van Rensburg, "Cops gun for Pamodzi liquidator, court chief and IDC man", *City Press* 15 April 2019 (available at https://city-press.news24.com/Business/cops-gun-for-pamodzi-liquidator-court-chief-and-idc-man-20190415).

ADVOCATE REAN STRYDOM SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 17 December 1955

B Comm (1977) and LLB (1979), University of Stellenbosch

LLM (Constitutional Law) (1994), Rand Afrikaans University

LLM (Corporation Law) (2004), Rand Afrikaans University

CAREER PATH

Acting Judge, Gauteng & Mpumalanga High Courts (May – June, November – December 2011 ; May – June 2013 ; July – September 2014 ; February – March, October – December 2015 ; May – June, October – December 2016; May – June, August – September, October – December 2017 ; January – April, April – June, July – August, October - December 2018, January – March, April – June 2019).

Advocate (1980 -)

Founding member, Mpumalanga Society of Advocates (2015 -)

Commissioner, Small Claims Court (1990 – 1998)

Member, General Council of the Bar Appeal Tribunal

Member and head of disciplinary committee, Randpark Golf Club.

SELECTED JUDGMENTS

PRIVATE LAW

MYHILL, ELE N.O (SWALIBE MINORS) V ROAD ACCIDENT FUND, UNREPORTED JUDGEMENT, CASE NO: 2009/30430 (SOUTH GAUTENG HIGH COURT)

Judgment delivered 5 March 2012

This was an action for the setting aside of compromises entered into 13 years previously between two minor children as represented by their mother and the Fund.

Strydom AJ held:

"... Mrs Swalibe, according to the documentation referred to in evidence, accepted the compromises without an undertaking from the defendant to pay for future medical expenses. Provision for such an undertaking appeared on the printed forms she has signed, but was deleted. Considering her knowledge at the time that the children suffered from epileptic fits, she should not have, objectively considered, accepted these settlements without an undertaking from the defendant to pay for future medical expenses. By doing this she did not act in the best interest of the minors." [Paragraph 30]

"... The apportionment applied by the defendant for settlement purposes, by deducting 30% of the estimated value of the claims, was similarly not in the interest of the minor children. If the minor children's mother was contributory negligent in causing their damages, they would have had a claim against her to the extent that her negligence contributed to their injuries, alternatively, the defendant being liable for the full amount, would have had a counterclaim against Mrs Swalibe. On behalf of the defendant it was argued that the defendant was entitled to make an offer for settlement and it clearly was entitled to take into account that it had a counterclaim on its view of the merits." [Paragraph 31]

"The question is not whether legally some form of set-off could be applied in this kind of circumstance. It might be legally correct to do so, but is it in the best interest of the children when a mother avoids a counter-claim against her by reducing her minors' claims? I am of the view that set-off under these circumstances will not be in the best interest of minors. Considering that the amount offered is already an amount less than full value, such amount should not be reduced by 30%. The effect of the apportionment is that the minors only received 70% of that which was calculated to be the value of their claims. It would have been in the best interest of the minors to receive 100% of the calculated value of their claims. I find it difficult to understand why, under such circumstances, their claim should have been apportioned. Although possible litigation was avoided between the defendant and Mrs. Swalibe in her personal capacity, this should not have been done at the expense of the claims of the minor children. ... " [Paragraph 32]

"Once a finding is made that the compromises were not in the best interest of the children, the next enquiry should be whether these settlement agreements could legally be set aside." [Paragraph 33]

"The parties could not refer me to any decided cases on the issue ... Ultimately, the test should be whether the compromise was concluded in the best interest of the child at the time that it was

concluded. In exercising the court's discretion as upper guardian, the court's paramount consideration is always the best interest of the child in question. ..." [Paragraph 37]

"... I have already come to the conclusion that the compromises were not in the best interest of the minors. In arriving at this conclusion, I have taken cognizance of the seriousness of the injuries and the evidence of epilepsy, the 30% apportionment applied, the lack of an undertaking given to pay for future medical costs, and the fact that possible litigation was avoided. I accept that a compromise should not be lightly set aside ... The 'best interests of minor children' standard tipped the scale, even considering that litigation was avoided, in favour of a finding setting aside these compromises. These compromises are prejudicial to the interest of the minor children." [Paragraph 41]

The compromise was set aside. On appeal, the decision was upheld by the SCA in **Road Accident Fund v Myhill NO (505/2012) [2013] ZASCA 73 (29 May 2013)**.

COMMERCIAL LAW

COSIRA NAMIBIA (PTY) LIMITED V AREVA PROCESSING NAMIBIA (PTY) LIMITED AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO: 17248/2013 (SOUTH GAUTENG HIGH COURT)

Judgment delivered 16 July 2013

Applicant had contracted with first respondent to perform construction services, and in terms of the contract had to furnish a performance guarantee to the first respondent. Second respondent had issued a similar guarantee to the first respondent. First respondent called up the applicant's guarantee, alleging breach by the applicant. Applicant then sought to interdict the first respondent from receiving payment pursuant to the guarantee. The decisive issue was whether the guarantee was a "demand bond" or a "surety bond".

Strydom AJ held:

"... This is a legal question and requires interpretation of the performance guarantee. A demand bond is a bond where there is no requirement of an obligation of liability on the part of the contractor under the construction contract. All the beneficiary needs to do is to demand payment and comply with the specified events mentioned in the bond. The only basis on which liability can be avoided is fraud on the part of the beneficiary. ... [A] surety bond, also often referred to as a conditional bond, requires from a beneficiary to establish liability on the part of the contractor in terms of the contract. It is in the nature of a suretyship and the liability is accessory to the principal liability. A contractor may raise any defence which it has in terms of the construction contract." [Paragraph 4]

"It is common cause that the demand was made within the time limit and was formalistically in order. ... The ordinary rules applicable to contractual interpretation should be applied. The words in the bond must be given their ordinary grammatical meaning. Unless there is ambiguity when this is done the court will not have to go beyond the interpretation of the ordinary meaning to establish the intention of the parties. ... " [Paragraphs 6 - 7]

"… On a proper interpretation of the wording of the performance guarantee it becomes clear that what is stipulated as a requirement for liability is nothing more than a statement that the principal (applicant) is in breach of its obligation under the contract. It is not required [to] go beyond a mere statement alleging that the applicant is in breach … I find that the performance guarantee is a demand bond as the undertaking to pay is not depended [sic] upon any condition or term other than receipt by the surety … of the first respondent's demand in writing … The mere statement that the principal is in breach is sufficient to create the obligation to pay. … " [Paragraph 8]

"… [T]he further issue for decision is then whether the applicant has shown … that it has a defence to prevent the payment of the guaranteed amount. The only relevant defence … is the allegation that the first respondent with full knowledge of the true situation misrepresented the facts by stating that the applicant was in breach of its obligations under the contract, whilst this was not the case. According to the applicant, the contract between it and the first respondent was terminated by agreement and consequently the applicant could no longer have been in breach …" [Paragraph 9]

"… [T]he question is … whether the applicant has shown, on a prima facie basis, that the first respondent's allegation, that the applicant was in breach of the construction contract, was knowingly false, as the construction contract was already terminated by agreement, when the statement was made." [Paragraph 11]

"… I am of the view that on the applicant's own version it has not established an agreement to terminate. …" [Paragraph 13]

"… On the contrary, on the papers before me a finding can be made that the contact was terminated as a result of the applicant's default by suspending its performance in terms of the contract. This action amounted to a repudiation of the contract which was accepted by the first respondent." [Paragraph 17]

The application was dismissed with costs.

CIVIL PROCEDURE

STAND 278 STRYDOM PARK (PTY) LTD V EKURHULENI METROPOLITAN MUNICIPALITY (23503/2014) [2015] ZAGPJHC 79 (27 APRIL 2015)

Case heard 11 March 2015, Judgment delivered 27 April 2015

Applicant sought an order declaring that it was not liable to the respondent for arrears and charges on the account held by the previous property owners, and declaring that the respondent was not entitled to terminate the supply of services on the grounds that the previous owners were indebted to it. Several aspects of the relief sought were conceded. At issue remained a counter-application by the respondent.

Strydom AJ held:

"…. First, the respondent requires form this court to interpret this section to mean that the municipal debt incurred in relation to property rates, taxes and charges for the provision of

municipal services pertaining to all prior owners of the property ("the historical debt") constitute charges upon the property in terms of section 118(3) of the Systems Act. Second, the respondent asked the court to label the statutory right involved "a sui generis lien having the effect of a tacit statutory hypothec, created by operation of law, over the property". Thirdly, that these properties are, upon the granting of a monetary judgment against the historical owners, or any other person legally responsible for any such municipal debt, and subject to an order to such effect being granted, to be considered executable for the sum of such judgment." [Paragraph 11]

"What the respondent is now seeking is a declaratory that should it obtain a monetary judgment in future, which remains unpaid, then this court must now, at this stage, find that execution against the applicant's property can be effected." [Paragraph 12]

"The effect of granting such an order would be that if a judgment is obtained against anybody for payment of the debt for arrear municipal fees, rates and taxes in relation to the properties of the applicant, and the judgment amount remains unpaid, the applicant's properties may be sold in execution if the applicant fails to pay the debt of the historical owners. Without a doubt such order will have far reaching consequences as the judgment will be used to declare other properties executable should there be unpaid historical debt owing to municipalities." [Paragraph 13]

"The affidavits do not record that the respondent has taken any steps yet to recover the historical debt from the parties liable therefor. Indeed, it does not appear … whether the historical debt remains claimable or even if the respondent has a valid claim therefor. … [T]he respondent has not obtained a judgment against any one of the previous owners regarding their alleged outstanding debt. In fact, the wording … of the notice of motion in the counter application makes it clear that the relief is sought subject to the granting of a monetary judgment for payment of arrear municipal debt in relation to the properties of applicant." [Paragraph 15]

"Considering that the respondent has not obtained judgment against the debtors, the debt may be disputed by the historical owners. They may do so as they may still have a monetary interest in the existence and extent of the debt as they might have indemnified subsequent purchasers against outstanding municipal fees. These debts might have prescribed. …" [Paragraph 18]

"… What the respondent also concedes … is that it has not started to take steps against the previous owners that are responsible for the historical debts. It first wants this court to confirm the legal position and to declare the properties of the applicant executable. On the respondent's own version, the Supreme Court of Appeal delivered judgments to the effect that execution can be effected against the properties in relation to which the debts were incurred. If this is the respondent's contention, it remains unclear why it requires from this Court to re-state the law. I am of the view that to require from this Court to declare the properties of the applicant executable to recoup historical debt without any judgment that such debt is outstanding and payable is untenable." [Paragraph 20]

"I am of the view that before a court can declare property executable, the principle obligation, i.e. the principal debt must be established and a judgment obtained. … Once a judgment is obtained relating to the principal debt, a party can proceed to obtain an order to declare the security in relation to that debt to be executable. Without the debt being determined, there is no dispute or *lis* that exists between the applicant and the respondent. … [T]he applicant is not liable to the

respondent for arrears or charges on accounts held by previous owners of the properties. Whether the respondent can execute against the property of the applicant to obtain payment of historical debts is another matter." [Paragraph 23]

"I am not convinced of the correctness of the argument … to the effect that a municipality, pursuant to the terms of section 118(3), can execute against properties of a current owner in relation to previous owners' historical debt outside the ambit of a transfer of the property where a preference is provided over any mortgage bond registered against the property. I do not intend to decide this issue as it is my view that without a dispute or *lis* between the parties in this matter I should not exercise my discretion in favour of the respondent to grant declaratory relief. … [W]here no *lis* exist between litigation parties a court should not exercise its discretion in favour of ordering declaratory relief. The relief that the respondent is seeking is sought in a vacuum as there exists no judgment debt to be enforced against the applicant's property. Once such judgment is obtained and the extent of the liability is established, the respondent can approach a competent court for a declarator in terms of which the properties are to be declared executable. …"

The counter-application was dismissed.

CRIMINAL JUSTICE

BABULI AND OTHERS V NATIONAL DIRECTOR OF PUBLIC PROSECUTION AND ANOTHER (CC32/14) [2017] ZAGPPHC 64 (24 FEBRUARY 2017)

Appellants were convicted for conspiracy to commit murder and murder, and sentenced to 15 years, 18 years, and life imprisonment respectively. The appeal was against conviction and sentence.

Strydom AJ (Moshidi and Meyer JJ concurring) held:

"Before dealing with the evidence of Ms Tlako and Mr Mpandana to establish whether their evidence could be accepted to convict the appellants, the reliance of the court a *quo* on the extra-curial statement of the co-accused to convict the appellants should be considered." [Paragraph 8]

"The wording of this section [s 219A of the Criminal Procedure Act] cannot be interpreted to mean that admissions made extra-curially by a co-accused can be relied upon for the conviction of another accused. Further, our Constitution does not permit the admission of an extra-curial statement by an accused against a co-accused as it infringes upon an accused's fundamental rights which are protected by the Bill of Rights. …" [Paragraph 10]

"… [A]ny reliance the court a *quo* placed on the extra-curial admissions and statements of accused 1 and 7, which were not confirmed by them in court, to convict the appellants was wrong in law and will not be considered by this court to ascertain whether the State has proven beyond reasonable doubt the guilt of the appellants. This court will have to consider the admissible evidence to establish whether the convictions of the court a *quo* should be sustained." [Paragraph 13]

Strydom AJ found that the court *a quo* had erred in relying on the evidence of Ms Tlako and Mr Mpandana, and continued:

"The state relied on a common intention between the accused to kill deceased to convict them on the murder count. What the court has done was first to find that a conspiracy to kill the deceased was proven, then the court relied on the statement of accused 7, which is inadmissible against the appellants, to conclude that the appellants formed a common purpose to kill and in fact caused the killing the deceased. Without a finding that the state has proven the conspiracy, and without further evidence, a finding of a common purpose cannot be sustained. The court a *quo* relied on the extra-curial statements of accused 1 and 7 in support of its inference that the appellants and accused 1 obtained the services of accused 7 to commit the murder. Apart from accused 7's statement there was no evidence whatsoever which indicated that the appellants and accused 1 agreed with accused 7 that he should perform the act of killing the deceased." [Paragraph 29]

The appeal was upheld, and the convictions and sentences set aside.

MEDIA COVERAGE

Quoted in a dispute whether the building of a church on private property was interdicted:

> "The owners of a farm overlooking the Hartbeespoort Dam have obtained an urgent interdict against a neighbour who is apparently intent on building an illegal church on their property.
>
> The Kenya-based directors of the company BobTrak, which owns the farm on the Magaliesberg Ridge, took Kosmos Ridge businessperson Sello Mogodiri to court after he started bulldozing large areas of grassland, claiming he had bought the farm and was planning to build a church.
>
> Advocate Rean Strydom, who manages the property on behalf of the owners – both international businessmen – said in court papers BobTrak had bought the property from the government in 1998 under their previous name, Sonnberg Rehabilitasie, and were still its legal owners.
>
> They initially planned to develop 12 hectares of the property, which fell outside the Magaliesberg protected greenbelt area, and obtained authorisation to establish a township and the approval of an environmental plan, but delayed their plans because of the economic downturn and were considering selling the property.
>
> Strydom said he first became aware of the excavation in April.
>
> Mogodiri claimed he had bought 42 hectares of the farm from a mining company.
>
> He said he was the new owner and was building a 2 700 square metre church on the land, but was not prepared to tell Strydom from whom he had bought it or give him an address.

Strydom said it was impossible that Mogodiri could have bought the land, because it could never have been sold without him being involved in the sale. He alleged Mogodiri had given him a false email address and never answered his calls.

Even after Mogodiri was warned not to continue with his conduct, he again started bulldozing a further area."

- Ilse de Lange, "Owners get interdict against neighbour trying to build church on their land", *The Citizen* 8 June 2017 (https://citizen.co.za/news/south-africa/1536619/land-grab-build-church/)

DR ELMARIE VAN DER SCHYFF

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 22 October 1966

BA (Law), Pochefstroom University for Christian Higher Education (1987)

LLB, Pochefstroom University for Christian Higher Education (1989)

LLM (cum laude), Pochefstroom University for Christian Higher Education (2003)

LLD, North West University (2007)

CAREER PATH

Acting Judge, Gauteng High Court (4th term 2017, 3rd and 4th terms 2018, 1st term 2019)

Personal Assistant, J.H. Smit Attorney (2004 – 2010)

Lecturer, North West University (2001 -)

Attorney, Elmarie Van Der Schyff Attorney (1992 – 2002)

Articled Clerk, Theron Jordaan and Smit Attorneys (1990 – 1991)

Member, Legal Practice Council (previously Law Society of the Northern Provinces, Law Society of South Africa) (1992 -)

Friend of the Association, Mentorship Champion, Gauteng, South African Chapter of the International Association of Women Judges (2018 -)

Member of Solidarity trade union (membership discontinued 2017)

SELECTED JUDGMENTS

PRIVATE LAW

JONES v ROAD ACCIDENT FUND 2019 (1) SA 514 (GP)

Case heard 7 September 2018, Judgment delivered 7 September 2018

This was the determination of a stated case. The Plaintiff had sustained bodily injuries when a rock had fallen from a heavy motor vehicle, which broke through the windscreen of Plaintiff's motor vehicle and struck Plaintiff on the head. At issue was whether the Plaintiff's claim was classified as a claim under section 17(1)(b) of the Act, as a claim where the identity of the insured driver had not been established, in which case it had been lodged too late; or under section 17(1)(a) as a claim where the identity of the insured driver had been established, in which case it had been lodged timeously. [Paragraphs 5 – 6].

Van Der Schyff AJ held:

"The crisp question before the court is whether, where an accident is caused in circumstances where it is not possible to identify a specific vehicle as 'the insured vehicle', but it is possible to identify a series of vehicles (and their owners), one of which probably caused or contributed to the accident at the time and place where the incident occurred, the claim falls into the category of what is often referred to as an 'identified' claim, as opposed to an 'unidentified' — or hit-and-run — claim." [Paragraph 11].

Van Der Schyff AJ held that a close reading of the two subsections showed that there was an "undeniable link" between the element of causation and the distinction created by the section, which led to the development of the terms 'identified vehicle' and 'unidentified vehicle'. [Paragraph 20].

Van Der Schyff AJ found that the vehicle had not been identified, and that the plaintiff was unable to show a causal link between any specific vehicle and the damages suffered. The claim therefore was one which had to be instituted in accordance with s 17(1)*(b)*, and had hence prescribed. [Paragraphs 28 – 29].

CIVIL PROCEDURE

O V O (89495/2016) [2017] ZAGPPHC 1287 (20 DECEMBER 2017)

Case heard 13 December 2017, Judgment delivered 20 December 2017

Applicant sought an order that the respondent be found in contempt of court.

After finding that the application could be adjudicated on an urgent basis [Paragraphs 4 – 5], Van Der Schyff AJ considered the nature of contempt proceedings, noting that:

"It is trite that compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. What is required in civil contempt matters is that sufficient care should be taken in the proceedings to ensure a fair procedure as far as possible with the provisions of section 35(3) of the Constitution …" [Paragraph 6].

Respondent admitted that the relevant maintenance order had been issued against him, and that he was ordered to pay maintenance to the Applicant and his minor child. Respondent further to being in default, but denied that the default was contemptuous. [Paragraph 11] The first three elements of contempt were established, making it necessary for the respondent to rebut the presumption of *mala fides* and wrongfulness. [Paragraph 12]. Van Der Schyff AJ held that she was not convicned that the respondent had discharged this burden: [Paragraph 16]

"… The Respondent clearly regarded his own future expenses as more important that putting funds aside to ensure compliance with a court order. In addition, the Respondent never alleges that he was honestly and *bona fide* under the impression that it would be justifiable under these circumstances. not to make provision for future performance in terms of the court order." [Paragraph 17].

Van Der Schyff AJ found further that the respondent had obtained significant funds through the sale of an overseas property, but had not set aside any funds for compliance with the court order. [Paragraph 18]. Van Der Schyff AJ concluded that:

"Although there is no *onus* on the Respondent, but merely an evidentiary burden to create a reasonable doubt as to the existence of wilfulness and *mala tides [sic],* the vague and unsubstantiated statements contained in the Respondent's answering affidavit did not succeed in rebutting the presumption of wilfulness and *mala fides.*" [Paragraph 23].

The respondent was found to be in contempt of court, and was committed to imprisonment for 10 days, suspended on condition pf payment being made to the applicant.

CRIMINAL JUSTICE

SHAIBU V THE STATE (A04/2018) [2018] ZAGPPHC 690 (14 SEPTEMBER 2018)

Case heard 3 September 2018, Judgment delivered 14 September 2018.

This was an appeal against a magistrate's refusal to grant bail to the appellant, a Ghanaian citizen, who stood trial for alleged offences under the Drug Trafficking Act.

Van Der Schyff AJ held that it was clear from the record that the magistrate had applied his mind to the decision, and had posed numerous questions to both legal representatives. [Paragraph 14]. Van Der Schyff AJ identified the main issue as being whether the appellant constituted a flight risk [Paragraph 17]:

"Given that the appellant is not a citizen of the country and that he was only in the country for a few days before he was arrested; that he is in the country on a visitor's visa; that the appellant's travel visa has already expired; that the charge against the appellant is of a very serious nature and will

attract a heavy sentence if the appellant is found guilty; that the appellant does not have any assets in the country; that the state has a strong case against the appellant; and that there is nothing keeping the appellant in the country, the learned magistrate found that the appellant did not discharge the onus to prove that he does not constitute a flight risk and that it is in the interest of justice to release him on bail." [Paragraph 19]

Van Der Schyff AJ held that the magistrate had "carefully considered all the facts" before refusing bail:

"He carefully weighed the interests of the appellant and the interests of society. He exercised his discretion judicially and I cannot fault the decision that he came to after considering the evidence that was placed before. The appellant did not provide substantial evidence to prove that he is not a flight risk." [Paragraph 20].

The appeal was dismissed.

SELECTED ARTICLES

"THE RIGHT TO BE GRANTED ACCESS OVER THE PROPERTY OF OTHERS IN ORDER TO ENTER PROSPECTING OR MINING AREAS: REVISITING JOUBERT V MARANDA MINING COMPANY (PTY) LTD [2009] 4 ALL SA 127 (SCA)", *POCHEFSTROOM ELECTRONIC LAW JOURNAL* VOL 22 (2019)

This article discusses the mineral law regime introduced by the Mineral and Petroleum Resources Development Act (MPRDA). The article identifies one of the aims of the Act as being "to delineate the rights and obligations of holders of prospecting and mining rights, and posits that "[o]ne would expect that the interpretation of the provisions delineating the entitlements acquired by holders of prospecting and mining rights and the determination of the consequential burden on landownership that they create would be quite simple." However, the article notes complexity in the relationship between the holders of rights to minerals and landowners "when the nuanced differentiation between the terms "enter" and "access" comes into play." [Pages 2 – 3].

The article discusses rights of access under the common law [pages 5 – 8], before analysing the right to access and entry provided for the MPRDA [pages 8 – 13]. An argument is advanced that the right to enter land in order to conduct extractive activities relates only to "a precisely described piece of land", and that the legislature had not intended "to incorporate access over the land of the landowner on whose property the prospecting or mining area is located as an integral, non-negotiable part of the entitlement to "enter the land to which the right relates", but considered it an independent matter that had to be determined on a case-by-case basis." [Page 12].

The article then considers the SCA judgment in *Joubert*, which "seemingly held an opposing view." [Pages 13 – 18]

"The court never distinguished between the notions of access and entry and clearly regarded the matter of access as inherently linked to the right holder's entitlement to enter the land and exploit its mining permit. The court subsequently implicitly afforded a very wide interpretation to the term "enter". In coming to this view, the court did not consider that the MPRDA profoundly altered the relationship between landowners and holders of rights to minerals. It seems as if the court … unwittingly reverted to the common law position where access to prospecting and mining areas was regarded as following summarily upon the granting of the prospecting or mining right". [Page 18].

The article concludes by arguing that, in light of the new mineral law regime introduced by the MPRDA, it would not be justifiable to "summarily accept" that legal principles developed under the entirely different common law regime "apply unchanged in a new regime."

"The foundational basis of the rights and concomitant ancillary rights tat exist in this new regime must be re-determined." [Page 25].

"STEWARDSHIP DOCTRINES OF PUBLIC TRUST: HAS THE EAGLE OF PUBLIC TRUST LANDED ON SOUTH AFRICAN SOIL?" (2013) 130 *SOUTH AFRICAN LAW JOURNAL* 369.

This article discusses the doctrine of public trust, which is described as "controversial" in South African law:

"The reality is, however, that the philosophical notion or ethic that governments exercise a fiduciary trust on behalf of their people and that 'certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace'4 has been incorporated in different pieces of environmental and natural resources-related legislation in this country." [Page 370].

The article focuses on the question of "determining whether statutory stewardship doctrines of public trust have been incorporated in South African law." [Page 370]. After defining the concept of "public trusteeship", including the American public trust doctrine (pages 370 – 379), the article then analyses South African environmental and natural resource – related legislation. It argues that "certain words and phrases can be identified as 'public trust' language" [page 379], and proceeds to locate such language within the South African legal framework. The article identifies pertinent legislation asthe National Water Act and the National Environmental Management Act [pages 380 – 381], and argues that these Acts provide the state with custodial authority, and a fiduciary responsibility, for natural resources:

"It is clear from the cluster of relevant legislation that the state or national government has an overwhelming fiduciary responsibility to deal with the resource in the public interest. The sole aim of managing, protecting and conserving the environment and applicable natural resources is to ensure that all South Africans gain from the benefit." [Page 382]. The beneficiaries are then identified:

"None of these statutes are aimed at promoting individual interests. It is the joint interests of the public, the South African nation as a whole, that are advanced." [Page 383].

The article then discusses the categories of things covered by the legislation [pages 384 – 385], before concluding with a discussion of the implications of the argument advanced for property law [pages 385 – 387].

ADVOCATE BRAD WANLESS SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 28 June 1962

BA, University of Kwa-Zulu (1983)

LLB, University of Kwa-Zulu (1985)

Diploma in Maritime Law, University of Kwa-Zulu (1987)

CAREER PATH

Acting Judge, Gauteng High Court (August – September 2015; July – August 2016; July – August 2017; January – February, April – June, October – December 2018; February – March, April – June, July – August, September – October 2019).

Acting Judge, KwaZulu-Natal High Court (March - April 2012)

Advocate

Senior Counsel (2016 -)

Senior Counsel, Society of Advocates for KwaZulu-Natal (2011 – 2016)

Junior counsel, Society of Advocates for KwaZulu-Natal (1990 – 2011)

Public Prosecutor, Department of Justice, 1988 – 1990

Member, Legal Practice Council (2019 –)

Member and sub-committee committee member, Society of Advocates for Kwazulu-Natal (1990 – 2016)

Director, EnterAfrica (Pty) Ltd (2016 –)

Director, Enana Online (Pty) Ltd (2017 – 2018)

SELECTED JUDGMENTS

PRIVATE LAW

PIENAAR V ROAD ACCIDENT FUND (2011/43693) [2015] ZAGPJHC 205 (11 SETEMBER 2015)

Case heard 25 August 2015, Judgment delivered 11 September 2015

This was an action instituted against the Road Accident Fund, for damages arising from a motor vehicle collision. The court had to decide on whether the defendant was liable to compensate the plaintiff, and on whether the damage had to be apportioned between the parties.

Wanless AJ analysed the evidence of the witnesses, and then set out the applicable law. In particular, Wanless AJ held that it was the duty of all road users to keep a proper lookout, including the checking of rear view mirrors [Paragraphs 57 – 58]. There was also a "stringent duty" on drivers turning across oncoming traffic, due to the inherently dangerous nature of the manoeuvre. [Paragraph 59].

Wanless AJ then analysed the most probably version of how the collision had occurred [Paragraph 61 ff], and found that it was "improbable" that the insured driver had indicated their intention to turn right, as "it is improbable that a driver would commence indicating to execute a right turn some 200 metres prior to the intersection where that driver intended to turn." [Paragraph 68]. In any event, the insured driver had failed to keep a proper lookout and take the necessary precautions [Paragraph 69]. The insured driver had therefore been negligent, and that negligence was a cause of the accident [Paragraph 70].

What remained to be considered was whether this negligence was the sole cause of the collision, or whether the Plaintiff had also been negligent. Wanless AJ noted that the Plaintiff had not given evidence, since the head injury sustained in the accident meant the plaintiff had no direct memory of the incident. [Paragraph 72]. Wanless AJ found that:

"[T]here is no evidence before this court of any negligence whatsoever on behalf of the Plaintiff. Further, simply because the Plaintiff collided with the rear of the insured vehicle does not, to my mind, draw the sole inference that the Plaintiff must have been, to one degree or another, negligent. … On the same facts the exact opposite inference may be drawn, namely that the insured driver turned suddenly from the left hand lane into the right hand lane … directly into the Plaintiff's path of travel causing the collision. …" [Paragraphs 73 – 74]

Wanless AJ held that the negligence of the insured driver had been the sole cause of the collision. The defendant was therefore held to be liable to the plaintiff for all the agreed or proven damages.

GEORGIOU V TYRES 2000 (HERIOTDALE) PTY LIMITED (33788/2014) [2015] ZAGP JHC 206 (16 SEPTEMBER 2015)

Case heard 27 August 2015, Judgment delivered 16 September 2015

The plaintiff was claiming payment from the defendant in the sum of R354 959 arising from an oral agreement entered between the parties. The plaintiff refurbished and renovated the property of the defendant and through a representative of the defendant, the defendant undertook to pay for the refurbishment. The court had to decide whether the parties had agreed that the defendant would be reimbursed for his expenses before reimbursing the plaintiff's costs, after which the parties would split the profit equally. Second, the court had to decide on whether the amounts claimed as expenses by the defendant should be accepted, and whether the defendant was liable for the claimed amount by the applicants.

Wanless AJ first dealt with the correct approach in cases where there are conflicting factual versions. In such cases, various factors are considered, including the credibility of the witnesses; the evaluation of each party's version and whether the party bearing onus has discharged such a function. In evaluating the evidence, Wanless AJ found it improbable that the parties would have agreed to reimbursing the defendant before the plaintiff. The court further found that it was more probable that the plaintiff would not have put herself at risk by agreeing to a term whereby the defendant would be reimbursed before she was. [Paragraphs 55 – 57]. Wanless AJ found that it was an implied term of the agreement that both parties would be reimbursed their costs before sharing the profits. Wanless AJ held that such an interpretation was one that gave business efficacy and in addition, satisfied the "officious bystander" test. [Paragraphs 58 – 59].

On whether the claim by the defendant for interest on an overdraft should be accepted, Wanless AJ found:

'To my mind it is clear that it should not. Despite having had the opportunity to do so the Defendant elected not to place any documentary evidence or evidence of a witness who had personal knowledge thereof before this court to show that this amount was, in the first instance, correct and more particularly, that it was legitimately incurred in relation to the purchase of the property. In the premises, there is nothing before me which could enable me to find that this amount can be claimed by the Defendant as an expense incurred in the purchase of the property.' [Paragraph 64]

The Plainitiff's claim was upheld.

SLABBERT V DU PLESSIS (A5052/2018) [2019] ZAGPJHC 190 (3 JUNE 2019)

Case heard 27 May 2019, Judgment delivered 3 June 2019

This was an appeal against a judgment granting the respondent (applicant in the court *a quo*) had been granted declaratory relief in relation to immovable property. The parties had "either wittingly or unwittingly (it not being necessary to decide) were part of a massive fraud perpetuated by

Brusson Finance (Pty) Limited ". [Paragraph 3]. Appellant was ordered to pay costs on the attorney and client scale.

The main issue before the court on appeal related to an alleged oral agreement that purported to replace a written agreement on the transfer of the immovable property. The respondent had borrowed some funds from the appellant for a business venture against the security of her home. Several similar cases by the appellant had been declared fraudulent and unlawful by courts. The appellant argued that pursuant to the demise of the scheme, the parties had entered into an oral agreement, which in essence replaced the invalid agreement. The court *a quo* had concluded that since the transfer of ownership from the respondent to the appellant was occasioned by fraud, such transfer was of no force and effect, despite the alleged agreement. The appellant was therefore never at any stage the lawful owner of the immovable property. [Paragraph 9].

Wanless AJ (Matojane and Wright JJ concurring) held that there was nothing in the case to show that the court *a quo* misdirected itself in granting the respondent the relief sought. The court declined to consider whether there was a dispute of fact raised on the papers on whether the oral agreement was entered, since such agreement had no effect. Subsection 2(1) of the Alienation of Land Act required a deed of alienation to be signed by the parties to effect transfer of property. Since the appellant was relying on an oral agreement, and that no written agreement existed, the purported sale was of no effect. [Paragraph s 12 – 14].

Relying on **Nedbank Ltd v Mendelow and Another**, the Wanless AJ held that since the underlying agreement to pass ownership was tainted by fraud, ownership did not pass. Wanless J found further that:

"The Appellant's Notice of Appeal raises a plethora of issues and consists of no less than 18 pages (excluding the annexures thereto). Each and every issue as set out therein has not (for obvious reasons) been specifically dealt with in this judgment. The principal reason therefor is that, once again in light of the fact that the transaction which took place is invalid, being tainted by fraud, it is unnecessary to do so, alternatively, these issues were either abandoned by the Appellant on appeal or were not argued with any real "conviction"." [Paragraph 18]

Wanless AJ turned finally to the question of costs:

"...As a result thereof the Respondent has, once again, incurred unnecessary legal costs. In this regard the fact that the court *a quo* adopted what could well be described as a conservative approach in granting the Appellant leave to appeal on the basis that the Appellant had shown that a court of appeal may have come to a different decision (without stating any reasons therefor), does not diminish the culpability of the Appellant in proceeding with this appeal. Nor does it provide any sustenance for an argument that this court should, in dismissing this appeal with costs, deviate from the scale of costs as awarded by the court *a quo*.' [Paragraph 21]

The appeal was dismissed with costs awarded on the scale of attorney and client.

JUDGE T.P. MUDAU

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 18 December 1962.

Bluris, University of Venda (1987)

LLB, University of Venda (1992)

LLM, Rand Afrikaans University (2004)

CAREER PATH

Judge, Gauteng High Court (2016 -)

Acting Judge, Gauteng High Court (2012, 2013, 2015)

Regional Magistrate, Randburg (2005 – 2015)

Acting Regional Magistrate, Gauteng (2001 – 2005)

Senior Magistrate, Johannesburg (February 1997 – 2005)

Senior control magistrate and head of section, criminal courts (from 1998)

Acting Regional Magistrate, Thoyandou (1997)

Magistrate, Thoyandou (1992 – 1997)

Head of section, civil and family courts

Appointed as magistrate (1987)

Member of Provincial and National Executive, JOASA

Elder (designate), Church of the Holy Ghost

Member, School Governing Body, Randpark High School (2015 -), Randpark Primary School (2012 – 2014)

SELECTED JUDGMENTS

PRIVATE LAW

E V E (2013/27961) [2013] ZAGPJHC 262 (24 OCTOBER 2013)

Case heard 14 October 2013, Judgment delivered 24 October 2013.

Applicant sought an order, pending a divorce action, for inter alia maintenance for herself, and a contribution towards her legal costs. The respondent opposed the application on the grounds that the applicant's monthly financial requirements were excessive and could be covered by her earnings, and that he could not afford to pay the amount claimed [Paragraph 7].

Mudau AJ held that the respondent, who could "hardly be described as a man of straw", had failed to provide evidence of his true financial means, and had "not fully, frankly and clearly disclosed his financial affairs." [Paragraphs 8 – 9]. Mudau AJ held further that although the respondent's total monthly expenses appeared to far exceed his monthly salary:

> "I have no difficulty in finding that the respondent is not candid with this court with regard to his financial affairs. It can easily be inferred … that the respondent is financially stable. …" [Paragraphs 10 – 11]

After identifying certain expenses as non-essential, Mudau AJ found that the applicant had established a case which entitled her to maintenance *pendente lite*. Respondent was ordered to pay maintenance *pendente lite* of R15 000.00 per month to the applicant, and to pay R3 000.00 towards the applicant's legal costs. [Paragraphs 14 – 15].

CRIMINAL JUSTICE

MOMBERG V S (A206/2018) [2019] ZAGPJHC 183 (28 JUNE 2019)

Case heard 11 June 2019, Judgment delivered 28 June 2019

The appellant was convicted on four counts of *crimen injuria* and sentenced to three years' imprisonment, with one year conditionally suspended. The appellant had made telephone calls to the South African Police Services' emergency helpline following a robbery, and had insulted and sworn at helpline operators and police officers, using racially offensive language [Paragraphs 5 – 14]. The appellant raised a defence of sane automatism or non-pathological criminal incapacity.

Mudau J (Mia AJ concurring) held that a voluntary act was an essential element of criminal responsibility, and that defences such as automatism required careful scrutiny, even where supported by medical evidence [Paragraph 15]. Mudau J rejected the appeal against conviction:

> "… I cannot find any fault with the reasoning and conclusion of the magistrate. Her insulting words were not directed at the black person who allegedly smashed and grabbed but innocent people far removed from the scene of the original incident. In this case, the appellant had the

> presence of mind to call 10111 repeatedly but was clear in her choices that she did not want any help from black officers. There is no doubt that she was focused when she stopped the police patrol car but took offense when approached by a black police officer ... The insulting words were clearly directed at the black police officers and blacks in general. It follows, accordingly, that the appeal against conviction is without merit." [Paragraph 23]

The appeal against sentence was also dismissed:

> "... the incident took place while the police officials were engaged in their official duties. The insults arose out of and were in part directed at the performance of their work. Offenses committed against police officers whilst on duty are generally considered in a serious light. The police in this country work under very difficult circumstances. Regard being had to the totality of the facts regarding this case and the usual approach regarding sentence referred to as the 'triad', coupled with the fact that the appellant is and was quite evidently unremorseful for her conduct, the sentence imposed cannot be faulted." [Paragraph 34].

KHABEER V S (A300/2013) [2016] ZAGPJHC 136 (2 JUNE 2016)

Case heard 30 May 2016, Judgment delivered 2 June 2016

Appellant was convicted of attempted murder and sentenced to 10 years' imprisonment. The appeal was against sentence. Shortly before the hearing of the appeal, the accused attempted to have an updated pre-sentnece report, prepared by a criminologist, received as further evidence.

Mudau J (Swartz AJ concurring) held that if the report were to be admitted, "it does nothing more than show that the appellant and his children have added more years to their respective ages", and was "nothing more than a repetition of what was already before court." The evidence was therefore not materially relevant to the appeal [Paragraph 4].

On the merits of the appeal, Mudau J held:

> "[T]he appellant's actions on the night in question were that of someone acting rationally, purposefully and above all, goal-oriented. It is contrary to when someone acts with their temper and commits regrettable acts when they should have known better. ... [T]he appellant had powers of discernment and restraint, when his conduct is objectively viewed. The appellant was without doubt subjected to stressing conditions in his personal life but faced no more than millions of couples who do not resort to this kind of extreme violent behaviour. The objective evidence supports the State's contention that the appellant was not only fully aware of his actions but that there was premeditation in the commission of the offence." [Paragraph 19]

Mudau J rejected an argument based on the Constitutional Court judgment of *S v M* (*Centre for Child Law as Amicus Curiae)* and proceeded to note that it was "a notorious fact that instances of crime perpetrated against women in particular in this country are unacceptably high. These attitudes towards women inherently undermine the right to human dignity, the right to freedom and security of their persons, the right to privacy and the right to freedom of association as enshrined in the Bill of Rights." [Paragraphs 20 – 21; 23]. Mudau J held that the facts of the case rendered a non-custodial sentence "outrageously

unsuitable" [Paragraph 25]. The application to admit further evidence and the appeal were both dismissed.

S V MGIBELO 2013 (2) SACR 559 (GSJ)

Case heard 14 – 17, 20 – 21, 23, 27, 29, 31 May 2013; 6, 13 June 2013, Judgment delivered 20 June 2013

The accused was convicted of murder, attempted murder and arson. The accused and the deceased had previously been in a love relationship and had a child together. The accused had set on fire a shack where the deceased and his girlfriend were sleeping. The deceased died from the burn wounds, whilst his girlfriend "barely survived."

Mudau AJ emphasised the seriousness and prevalence of the offices [Paragraph 4], and described the attack as "callous, cruel and brutal. This was pure savagery. These were defenceless victims who had no means of escape …" [Paragraph 5]. Mudau AJ held that whilst the case appeared to have "the features of a 'crime of passion'", a proper consideration of the facts showed that "the conduct of the accused was At a glance, this case has, but a proper consideration of all the relevant facts shows that, on the contrary, the conduct of the accused was motivated by revenge or vengefulness. …" [Paragraph 6]

Mudau AJ held further that the accused's conduct had been "well planned and acted on throughout", and that the accused "was determined to carry out her threats" [Paragraph 8]. Mudau AJ held that the case was distinguishable from a 'crime of passion' "'in which an accused reacts spontaneously to perceived provocation, driven by anger, without sufficient time to consider his actions'" [Paragraph 9], and that the accused had committed "crimes of vengeance", and shown no remorse." [Paragraph 12].

"… [T]he accused is clearly not a candidate for a non-custodial form of sentence. I did not hear any argument or submission to the contrary. As the accused is a mother to two minor children, it is imperative to have regard to the interests of these children in mind when a proper and just sentence is considered. …" [Paragraph 14]

"With due regard to all the factors in mitigation and aggravation of sentence, I fail to find in the accused's favour the presence of 'substantial and compelling circumstances' that justify the imposition of lesser sentences than those prescribed. The offences committed were unnecessary. The accused's personal circumstances are commonplace and are overshadowed by the gravity of these crimes. In respect of count 2 (attempted murder), in view of the manner in which the crime was committed, as well as the permanent scars suffered by the complainant, there is justification to consider a sentence beyond the minimum sentence prescribed." [Paragraph 17]

The accused was sentenced to life imprisonment on the count of murder; 10 years' imprisonment on the count of attempted murder; and five years' imprisonment on the count of arson. She was also declared unfit to possess a firearm.

S v CHUIR AND ANOTHER 2012 (2) SACR 391 (GSJ)

Case heard 24 April 2012, Judgment delivered 24 April 2012.

This was an appeal against sentence, the accused having been convicted of one count of kidnapping and four counts of rape in the Regional Court. The complainant was a 40-year-old mother of four children.

Appellants were each sentenced to five years' imprisonment in respect of the kidnapping, and to 25 years' imprisonment in respect of the rape. The effective sentence was 25 years' imprisonment. At issue on appeal was whether the court *a quo* had correctly assessed the relevant factors in passing sentence.

Mudau AJ (Classen J concurring) held that the trial magistrate had been correct in finding that substantial and compelling circumstances existed which justified the imposition of a lesser sentence than life imprisonment. These factors were that the first appellant was 21 years old at the time of the offence and a first offender, who had a standard 8 level of education, was the father of a 2-year-old child, and was employed as a panel beater. At the time of sentencing the first appellant had spent a year in custody. The second appellant was 22 years old, a first offender the father of a minor child, and was also employed as a panel beater and had spent a year in custody before being sentenced. [Paragraph 8].

Mudau AJ held that the seriousness of the offences and "the prevalence of rape perpetrated against women and children" warranted a long term of imprisonment. Mudau AJ held that "[n]ot only is rape a serious offence", but that "its seriousness is exacerbated by its alarming incidence." After noting that the complainant was not only "almost twice the appellants' respective ages, but she was someone else's wife" Mudau AJ found that the complainant, having "been assaulted to subdue her, and kept against her will, must have been traumatised by her prolonged rape ordeal." Mudau AJ held further that:

> "In my view, the rape of a married woman and a mother cannot be categorised differently to the rape of a young virgin. In the case of a married woman the rape may negatively affect her married life. The absence of genital injuries to a mother, who has delivered four children, cannot be used to describe the rape as less serious." [Paragraph 10]

The appeal was dismissed.

ADMINISTRATION OF JUSTICE

LAW SOCIETY OF THE NORTHERN PROVINCES V LOURENS (64651/2014) [2015] ZAGPPHC 56 (6 FEBRUARY 2015)

Case heard 6 February 2015, Judgment delivered 6 February 2015.

This was an unopposed application to strike the respondent off the roll of attorneys. The respondent had failed to submit an auditors report to the applicant as required, and had failed to attend the ensuing disciplinary proceedings. [Paragraph 3].

Mudau AJ held that, having failed to comply with peremptory legislative provisions which precluded an attorney from practising without being in possession of a fidelity fund certificate, the respondent had "rendered himself guilty of unprofessional, dishonourable and unworthy conduct by failing to submit his Rule 70 report." Despite not being issued with the requisite certificate, the respondent continued to practice as an attorney until he was eventually suspended. [Paragraph 4]

Mudau AJ found that it was "abundantly clear" that there was a deficit in the respondent's bookkeeping in respect of the trust account, and that the respondent had contravened provisions of the Attorneys Act and the Law Society rules. [Paragraph 11] Mudau AJ held that the respondent had failed to keep proper accounting records, and thereby rendered himself guilty of dishonourable or unworthy conduct. [Paragraph 13]

> "… I have no doubt that the respondent can no longer be regarded as a fit and proper person to practice as an attorney. Accordingly, his name should be struck from the roll of practicing attorneys. His name should also be removed from the roll as a practicing conveyancer." [Paragraph 14]

In **Isaacs v Potgieter 2019 JDR 0624 (GJ)**, Mudau J sat with Weiner and Sutherland JJ. The judgment is under the name of "the court". The decision distinguished the defences of duress and undue influence and held that the written agreement in question was unenforceable due to undue influence by the Plaintiff on the Defendant.

The judgment is praised by Carmel Rickard ("Woman "unduly influenced" to sign by "bully" partner, so agreement invalid", 29 April 2019, available at https://africanlii.org/article/20190429/woman-%E2%80%9Cunduly-influenced%E2%80%9D-sign-bully-partner-so-agreement-invalid):

> "For me, the appeal judges' decision on this domestic drama shows a welcome and growing judicial sensitivity to the reality of ordinary people's lives and the potential for terrible legal, financial and emotional consequences resulting from subtle – and not so subtle – abuse.
>
> "Women are most often on the receiving end of such abusive relationships, and this seems a classic case, with counsel for Potgieter attacking the credibility of Isaacs via what the court termed, "(t)he old refrain of 'why didn't you leave; no-one would have tolerated such abuse'?" Fortunately, in this case at least, the judges did not accept such a glib and outdated approach but sensitively evaluated evidence of how the relationship actually worked."

MEDIA COVERAGE

Quoted at an event celebrating his appointment as a judge:

"To this end, continuous legal training is not only necessary, but a must for those generally involved in the administration of justice and in particular judicial officers to improve their skills. It is for this reason that, since I graduated from law school in 1987, I have taken advantage to participate, and whenever called upon, organised various workshops and conferences in my field of work under the auspices of the Justice College and the Judicial Officers Association of South Africa.".

- Elmon Tshikhudo, "Local law expert now a judge in Gauteng Division", *Limpopo Mirror* 12 February 2016, available at https://limpopomirror.co.za/articles/news/35366/2016-02-12/local-law-expert-now-a-judge-in-gauteng-division

Prior to the candidate's interview for appointment to the high court in 2015, the General Council of the Bar noted that (see https://johannesburgbar.co.za/wp-content/uploads/Mr-TP-Mudau.pdf):

> "The candidate has demonstrated in his judgments in both *Chuir* and *Tlale* … that he is particularly cognisant of the rights of women" [paragraph 5.1, page 4],

but noted comments by members of the Bar that:

> "give rise to reservations about the ability of the candidate to handle proceedings in the urgent court and about his work ethic." [paragraph 12.3, page 8].

An article by the Wits Justice project entitled "One man's long walk home" describes the story of a Mr Thuba Sithole, who was convicted and sentenced to 15 years imprisonment for armed robbery. The article charges that the case "shows shoddy police work, dodgy eyewitness testimony, a dismissive magistrate and a careless defence lawyer resulted in an innocent man being put behind bars." The article describes Mr Sithole appearing in the Randburg Magistrates' Court on 4 February 2009, before "magistrate Phanuel Mudau". The article describes the evidence of the complainants as "riddled with inconsistencies", and lacking certainty regarding the identification of Sithole. The article also argues that Sithole could not have covered the distance between his work and the crime scene in time.

> "His manager, Dean Dekanah, wrote a letter stating that Sithole left the store at 7.06pm, but the magistrate dismissed this evidence because while the letter did have a Pick 'n Pay stamp on it, it was not printed on an official letterhead.
>
> "Mudau was unperturbed by, and Kahn [Sithole's lawyer] did not protest the fact that no stolen goods were found on Sithole, nor were there any of his fingerprints on Sutton's car. If the crime occurred as described, Sithole's fingerprints would have been all over Sutton's car and her car keys .."

The article notes that an appeal against the conviction was dismissed by the high court.

- Ruth Hopkins and Kyla Herrmannsen, "Wits Justice Project: One man's long walk home", *Daily Maverick* 6 October 2014, available at https://www.dailymaverick.co.za/article/2014-10-06-wits-justice-project-one-mans-long-walk-home/.

JUDGE GERRIT MULLER

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 29 September 1953

Diploma Iuris, UNISA (1980)

BIuris, UNISA (1984)

LLB, UNISA (1989)

LLM (International Law), Rand Afrikaans University (2004)

LLM (Import and Export law), North West University (2005)

LLD (International Law), University of Johannesburg (2009)

LLD (Private Law), University of Pretoria (2018)

CAREER PATH

Judge, Limpopo High Court, Polokwane (2016 -)

Acting Judge, North Gauteng High Court (2010 – 2015)

Advocate, Pretoria Bar (1991 – 2016, appointed senior counsel 2009)

State Advocate, Department of Justice (1989 – 1991)

Additional Magistrate (1983 – 1989)

Regional Court Prosecutor (1980 – 1983)

Acting Assistant Magistrate (1976 – 1980)

Prosecutor, Department of Justice (1975)

Member, Association of State Advocates (1989 – 1991)

Member, NG Church Doornkloof (1991 – 2019)

SELECTED JUDGMENTS

PRIVATE LAW

KOMAPE AND OTHERS V MINISTER OF BASIC EDUCATION (1416/2015) [2018] ZALMPPHC 18 (23 APRIL 2018)

Case heard 13 – 17, 20 – 23, 27 - 28 November 2017 and 1 – 2 February 2018, Judgment delivered 23 April 2018.

This case stemmed from the death of their 5 – year old minor son, Michael Komape, who drowned after falling in to a pit lavatory at his school. Plaintiffs, members of the Komape family, claimed damages under various headings, several of which were conceded by the defendant. The remaining issues to be determined were the quantum of Claim A, a delictual claim for damages; the whole of Claim B, a claim for damages for grief suffered by the immediate family members, alternatively, constitutional damages; and in respect of Claim C, the necessity and number of sessions of psychological treatment required for future medical expenses, especially in respect of the minor children.

Muller J held that:

"This court is requested to develop the common law to award damages for grief which did not give rise to detectable or recognised psychiatric injury. In Claim B, grief is claimed as a substantive and different cause of action from bereavement, emotional shock and trauma suffered. There is, in my opinion, neither reason in law nor any policy consideration to draw a distinction between grief and any other psychiatric injury or harm. A claim for grief, if proved to have resulted in a detectable or recognised psychiatric injury … will sound in damages, as any other injury. A claim for grief, which caused no recognisable injury cannot be justified, as a psychiatric injury or on any policy considerations. It will no doubt lead to bogus and an unwarranted proliferation of claims for psychiatric injuries and pave the way for limitless claims for every conceivable cause of grief whether insignificant without expert psychiatric evidence." [Paragraph 39].

Muller J held that there was insufficient expert evidence before the court to prove that any members of the Komape family suffered from grief as a recognisable psychiatric illness, but that the evidence "established grief as a process similar to bereavement and mourning, which is not a recognisable psychiatric injury or illness." [Paragraph 48]. On this basis, Muller J held that:

"[T]here is no basis upon which the common law can or should be developed. Policy considerations militate against compensation for emotional suffering short of a recognisable psychiatric illness. Damages cannot be awarded for grief without the resultant recognisable psychiatric lesion or illness which is a requirement for claim A and B to succeed. Grieve [sic], as any other recognised psychiatric injury caused by foreseeable wrongful negligent conduct, must be proved by expert psychiatric evidence." [Paragraph 49].

Muller J made an award in favour of the minor children for future medical treatment under Claim C [Paragraphs 50 – 54], and then considered the alternative claim for constitutional damages. Muller J held that the evidence established violations of the rights to equality, dignity, life, a non-harmful environment, the best interests of children and to education. [Paragraphs 58 – 63]. Muller J held that the compensation claimed as constitutional damages was "nothing short of a claim for punitive damages", and that an appropriate remedy would be "an order directed at the enforcement, protection and the prevention of future encroachment of the rights protected in the Bill of Rights if the harm suffered is not adequately addressed by an effective common law claim". [Paragraph 67]. Muller J held that punitive damages were not appropriate relief, as they would result in the Komape family being "over compensated", and would also "not serve the interests of society." [Paragraph 68]. Muller J held further that a declaratory order would not sufficiently vindicate the rights of learners attending rural schools in the province. [Paragraph 69].

Muller J concluded that a structural interdict was "the only appropriate remedy that is just and equitable which will effectively vindicate the Constitution" [Paragraph 70], and ordered that the defendants supply and install a sufficient toilets "at each rural school currently equipped with pit latrines in the Province of Limpopo", and the report to the court on the implementation of the order.

The judgment has been criticised, with comments including that the court "failed to distinguish between the multiple levels of human rights violations … in respect of Michael himself, members of the Komape family as a result of his death and the ongoing violations of Limpopo learners", and that "[t]he Court further failed to recognise that the structural relief as a prospective remedy for the Limpopo learners and a remedy recognising the constitutional violations of the family, need not be mutually exclusive." [Section 27, *The road to justice in the case of Michael Komape*, 13 June 2019, available at http://section27.org.za/2019/06/the-road-to-justice-in-the-case-of-michael-komape/].

It has also been suggested that "[o]ne of the criticisms levelled against the Komape judgment was how, in awarding the structural interdict, it sidestepped the Constitution and overlooked the necessary common-law development." [Motheo Brodie and Vuyisile Malinga, "Michael Komape: Without appropriate remedies, rights mean nothing", *Daily Maverick* 25 August 2019, available at https://www.dailymaverick.co.za/article/2019-08-25-michael-komape-without-appropriate-remedies-rights-mean-nothing/].

CIVIL AND POLITICAL RIGHTS

DUPLAN V LOUBSER NO AND OTHERS (24589/2015) [2015] ZAGPPHC 849 (23 NOVEMBER 2015)

Case heard 5 October 2015, Judgment delivered 23 November 2015

This was an application for an order declaring that the applicant was entitled to inherit intestate from the deceased. The applicant and the deceased lived in a permanent same sex life partnership, and had

undertaken reciprocal duties of support. The partnership was neither solemnised nor registered in terms of the Civil Union Act.

Muller AJ noted the recognition of same sex marriages had a long history of prejudice and discrimination [Paragraph 6], and that the Act made it possible, for the first time "for gays and lesbians to be afforded a choice to enter into a formal relationship, recognised by law" which had the same status and privileges as heterosexual marriages. [Paragraphs 6 – 7]. Muller AJ held further that both before and after the establishment of constitutional democracy, the law had "traditionally distinguished between married people and unmarried people by according certain benefits to married people which the law did not accord unmarried people", and that the Act had not materially changed that distinction. The Act did bring same sex partnerships which were solemnised and registered in terms of the Act "in line with the status accorded to heterosexual couples who enter into a marriage relationship." [Paragraph 9].

Muller AJ then considered the Constitutional Court judgment of *Gory v Kolver NO*, which had used the remedy of reading-in to deal with unconstitutionality of the Intestate Succession Act:

"The order was, no doubt, aimed at permanent same sex life partnerships in which the partners have undertaken reciprocal duties of support to inherit intestate in the absence of legislation recognising same sex marriages. …" [Paragraph 13]

Muller AJ noted that since that judgment was delivered, the Civil Union Act had been passed, with the result that "[s]ame sex civil unions are now recognised as equal to heterosexual marriages", which meant that a distinction had to be drawn between those same sex partnerships which were solemnised and registered, and those which were not: "The former is [sic] recognized by law and the latter together with heterosexuals who have elected not to marry, are not". [Paragraph 14]. Muller AJ found that the nub of the complaint in the *Gory* case was the non-recognition of same sex marriages. This impediment had been removed by the introduction of the Civil Union Act, which declared partners in a civil union to be "spouses", and "cured the unconstitutionality of the non- recognition of same sex marriages only." [Paragraph 19].

Muller AJ held that the court was "not at liberty" to deviate from the reading-in [Paragraph 20]:

"A partner in same sex partnership solemnised and registered in terms of the Act is for all intents and purposes a "spouse" as envisaged by s 1(1)(a) of the Intestate Succession Act … However, be that as it may, I am nevertheless obliged to "read-in" in s 1(1)(a) the following words after the word "spouse":" or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support"." [Paragraph 22]

Muller AJ also held that he could not find that the Civil Union Act had cured the constitutional defect in the Intestate Succession Act, without a specific amendment to that effect. Muller AJ did suggest "in passing, that the "reading-in", in my respectful view, leads to discrimination against unmarried heterosexual couples." [Paragraph 23].

The application was granted. The decision was upheld by the Constitutional Court in **Laubscher N.O. v Duplan and Another 2017 (2) SA 264 (CC).**

CRIMINAL JUSTICE

S V LEKALAKALA (113/2017) [2017] ZALMPPHC 36 (9 NOVEMBER 2017)

During the course of criminal proceedings, the presiding magistrate observed the accused, who was seated in the public gallery, throwing something to a Mr Baloyi, who was appearing in the court on drug related charges. When questioned by the magistrate, the accused stated that the object he had thrown was a bag of dagga. The accused was convicted of contempt of court and sentenced to 3 months' imprisonment [paragraphs 1 – 2].

Muller J (AML Phatudi ADJP concurring) held:

"The accused was a member of the public sitting in the gallery when he passed a packet containing dagga to Baloyi who was in the dock whilst his case was being dealt with by the court by throwing it to him. In my view such conduct is improper and wilful misbehavior on his part and a contravention of section 108(1) [of the Magistrates' Court Act]. Members of the public cannot be allowed to harm the decorum of court proceedings in the way he has done. It harms the administration of justice in the eyes of the public which should be conducted in a calm and orderly fashion." [Paragraph 10].

Muller J then turned to consider whether he magistrate had been justified in dealing with the case summarily, or whether it should have been referred to the Director of Public Prosecutions for further action. [Paragraph 11]. Muller noted that whilst the summary procedure employed was prima facie contrary to the Constitution, "the need for swift measures to preserve the integrity of the judicial process by means of a summary enquiry into the conduct of the accused is sometimes called for." [Paragraph 12].

Muller J concluded that the magistrate had failed to follow the applicable procedure for dealing with the matter. The magistrate had failed to read the provisions of the applicable section to the accused, and "nor was the accused informed of his constitutional rights to engage the services of a legal representative." [Paragraph 14]. Muller J held further that the sentence of 3 months imprisonment was excessive, and that the accused had not been given the opportunity to adduce evidence or to address the court in mitigation of sentence before the sentence was imposed. As a result, the trial had not been fair, and the conviction and sentence were set aside.

SELECTED ARTICLES

'THE LIABILITY OF BANKS AS MONEY LENDERS FOR DAMAGE TO THE ENVIRONMENT', (2006) 4 Journal of South African Law 665

The following is extracted from an English summary of the article. The article seeks to analyse the liability of banks for damage to the environment caused by borrowers through a comparative study of the law of the European Union, the United Stated, the United Kingdom and South Africa.

"Banks play an increasingly important role in the economy because they are in a position to promote development of the environment by utilising their financial resources. In some instances, lenders who took up finance from banks are responsible for damage to the environment. Why should banks that financed projects, in the normal course of events, be held liable for damage to the environment caused by borrowers?" (Page 688)

"The South African act of 1998, has its foundation in section 24 of the constitution of the Republic of South Africa. It incorporates sustainable development as a tool to harmonise the necessity to develop with the need to protect the environment. At the same time the act emphasises the role of the principle of intergenerational equity, which presupposes the duty of the current generation to hand over the earth in a better condition than in which it was received from the previous generation. In the future, when finance is considered for projects that may harm the environment, banks must take environmental as well as economical factors into account. Purely economical reasons cannot be the only relevant factor. Development that is financially sound will have to be weighed up against social factors as well as the impact that it will have on the environment." (Page 689)

"Section 28 of the act places a general duty of care on every person who causes, has caused or may cause significant pollution or degradation of the environment to prevent such pollution or degradation from occurring, continuing or recurring. The persons saddled with the duty of care are the owner, the person in control, or the person who has the right to use land or premises. Banks may, under certain circumstances, be considered to be the owner, person in control, or even the person who has the right to use land or premises. The polluter pays principle is introduced by section 28 as a basis for liability but the principle is expanded to include, not only the polluter, but also entities, such as banks, which in no way whatsoever, contributed to pollution or degradation. The act affords no protection to banks in cases where banks became owner of land by virtue of their security interest in the property. By following established commercial practices, banks may be held liable for environmental damage caused by their clients or erstwhile clients." (Page 689)

"The traditional role of banks as financial institutions has to change because of the duty placed on banks by the constitution and the act, to act as instruments in the protection of the environment. By exerting their influence and by implementing new procedures banks will be able to draw the attention of prospective clients to the need to comply with environmental legislation." (Page 689)

"The emphasis should rather be on the ability of banks, generally, to influence borrowers than to hold banks liable for damage caused to the environment by borrowers." (Page 689)

JUDGE LEGODI PHATUDI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 8 October 1961

B Iuris, University of Limpopo (1993)

LLB, University of Limpopo (1994)

CAREER PATH

Acting Deputy Judge President, Limpopo High Court (July – November 2017).

Judge, Gauteng High Court (2009 -)

Acting Judge, Gauteng High Court (2007, 2008).

Attorney, Legodi Phatudi Attorneys (1996 – 2008)

Candidate Attorney, Faan Vercueil Attorneys (1995 – 1996)

Councillor, Law Society of the Northern Provinces (2004 – 2008)

Limpopo Law Society

Chairperson (2004 – 2005)

Councillor (2002 – 2007)

Polokwane Attorney's Association

Treasurer (2003 – 2004)

Chairperson (2002 – 2003)

Deputy Chairperson (2001 – 2002)

Black Lawyers' Association

Deputy President (2005 – 2007)

Deputy Secretary-General (2003 – 2005)

Member, National Executive Committee (2001 – 2003)

Mount Hareb Presbyterian Church, Polokwane

Elder (2000 – 2003)

Member (1994 – 2008)

Member, Uniting Reformed Church in Southern Africa

General Secretary, Mphahlele Royal Family Council (2003 – 2006).

SELECTED JUDGMENTS

PRIVATE LAW

NEKOKWANE V ROAD ACCIDENT FUND (501/2012) [2017] ZALMPTHC 7 (20 JULY 2017)

Plaintiff claimed damages due to an accident which took place when the front loading bucket of a construction machine fell on his legs. The case dealt with the question of liability only. Phatudi ADJP considered the Plaintiff's argument that the falling of the front loading bucket onto the plaintiff's legs was "tantamount to the movement of the motor vehicle from its stationed place as a result of gravity, thus rendering the defendant liable as envisaged in terms of the Act." [Paragraph 12]. Phatudi ADJP identified the key issue as being "whether the "failing" of a front loader bucket can be said to be motor vehicle that moved as a result of gravity. Can an object that falls from a stationary motor vehicle fall within the ambit of the provisions of section 20 (2) of the Act?" [Paragraph 14].

Phatudi ADJP held further that:

"For the motor vehicle to be deemed to have moved, its tyres must … have rolled from its stationary position. The movement must have been occasioned by a motor vehicle which is being propelled by any mechanical, animal or human power or by gravity or momentum. Whatever propels the motor vehicle to move, such as gravity, the movement must have caused the tyres of the motor vehicle to "roll" from a stationary point or the first mention place as worded in the Act. …" [Paragraph 16].

On the facts of this case, the tyres of the vehicle had not moved, and thus the requirements of the Act were not fulfilled. [Paragraph 18]. Phatudi ADJP further held that the plaintiff had given contradictory evidence:

"The plaintiff vehemently denied during cross examination the contents of his … affidavit. This resulted in him contradicting himself so grossly that he created three versions. However, of all the three versions, the TLB remained stationary at all material times." [Paragraph 23].

The claim was dismissed with costs. An appeal to the Constitutional Court was rejected on the ground that the appeal raised factual issues only, and the court therefore lacked jurisdiction: **Nekokwane v Road Accident Fund (CCT322/17) [2019] ZACC 11; 2019 (6) BCLR 745 (CC) (26 March 2019).**

CIVIL AND POLITICAL RIGHTS

SOUTH AFRICAN PORK PRODUCERS ORGANISATION V NATIONAL COUNCIL OF SOCIETIES FOR THE PREVENTION OF CRUELTY OF ANIMALS (26060/2014) [2014] ZAGPPHC 877

Case heard 15 September 2014, Judgment delivered 5 November 2014

The applicant, a non-profit organisation representing the pork industry in South Africa, sought access to certain documentation allegedly held by the respondent, in terms of the Promotion of Access to Information Act.

Before dealing with the substance of the application, Phatudi J remarked:

"At the commencement of the hearing, I expressed my disapproval on the part of legal practitioner's tendency of requesting or directing that their matters be heard by certain judges. The applicant's attorney requested "that the matter be allocated to a senior judge adequately experienced to consider relevant issues" is, in my view, regrettably discouraged. I know not of such title, "senior judge". An acting judge is a judge. All judges are deemed to be adequately experienced to adjudicate and consider any legal issue before him/her." [Paragraph 2]

Phatudi J then proceeded, and found that the respondent was a public body in terms of PAIA [Paragraph 3]. Phatudi J noted that the respondent justified their refusal to supply the requested information "as a reasonable protection of privacy in respect of the third party who provided information that was supplied in confidence when lodging the complaint with them." Further, the respondent argued that disclosing the record could reasonably be expected to jeopordise the effectiveness of their method of protecting information provided by members of the public in lodging complaints of animal abuse. [Paragraph 12].

Phatudi J held that the respondent had a "discretionary power" to refuse a request for access to a record consisting of information supplied in confidence [Paragraph 23], and concluded that "the protection of privacy of the complainant and protection of confidentiality of the information given by the complainant is reasonable justifying the limitation in the constitutional right of access to information." [Paragraph 29]

CONSTITUTIONAL INTERPRETATION

MANSINGH V PRESIDENT OF REPUBLIC OF SOUTH AFRICA AND OTHERS (20879/2011) [2012] ZAGPPHC 3 (9 FEBRUARY 2012)

Case heard 28 - 29 November 2011, Judgment delivered 9 February 2012

The applicant, a practising advocate, sought an order declaring that the President lacked the power to confer the status of senior counsel on practising advocates.

Phatudi J held that, on South Africa becoming a Republic in 1961, the appointing of new senior counsel was a prerogative power bestowed on the President. [Paragraph 9]. Phatudi J found that it was common cause that he prerogative powers previously vested in the President were not retained under the 1993 or 1996 Constitutions, and that the President only has those powers "bestowed on him by the Constitution or by legislation consistent with the Constitution." [Paragraph 14]. Phatudi J held further that:

"... [T]he final constitution makes a clean break with the past. I am of the view that it was not an oversight on the part of the drafters on behalf of South Africans by not including the said prerogatives in adopting the Constitution. I do not agree ... that the prerogatives the Monarchs and the State President's respectively are codified in the Constitution. The drafter's thought of having a break with the past is, in my view, an avoidance of adopting concepts into the Constitution which are not based on the will of the people of South Africa. ..." [Paragraph 23]

Phatudi J considered an argument by the applicant that the conferral of senior counsel status was not listed on the Presidency's website as "part of the system of national orders", and that silk status was not an "honour" as contemplated by section 84(2)(k) of the Constitution, and "is not viewed as such by the President [Paragraphs 32 – 33]:

"...I am of the view that the argument ... that non inclusion of conferment of senior counsel status on the presidency website is not one such "honour" as envisaged in terms of section 84(2)(k), is correct. ... The Order of the Baobab, for instance, is awarded to South African citizens for services distinguished beyond the ordinary call of duty. It is an "honour" awarded for exceptional and distinguished contribution in community service. I am reluctant to accept that the framers of our autochthonous Constitution were comfortable that the President is empowered in terms of section 84(2) (k) to confer the status of senior counsel on practising advocates." [Paragraph 37]

Phatudi J held further that there was no legislation that empowered the President to ward the status of senior counsel to practising advocates, and noted that the term "Senior Counsel" was not defined in the Advocates Act. There was no legislation that covered "the conferment of honours on practising advocates." [Paragraph 45]. Phatudi J held that the Constitution did not contemplate "a system of awarding any professional who attained an advanced skill in forensic work in his or her profession a status of seniority." [Paragraph 47].

Phatudi J concluded that the appointment of senior counsel did not constitute the conferral of an honour in terms of section 84(2)(k) of the Constitution. [Paragraph 49]. "In my final analysis, the appointment of practising advocates as senior counsel does not amount to the conferring of an honour within the meaning of section 84(2)(k) of the Constitution of the Republic of South Africa." [Paragraph 49]

The decision was reversed by the Supreme Court of Appeal **(2013 (3) SA 294 (SCA)**) and the Constitutional Court **(2014 (2) SA 26 (CC)**).

CIVIL PROCEDURE

MALINGA v ROAD ACCIDENT FUND 2012 (5) SA 120 (GNP)

Case heard 5 October 2011, Judgment delivered 6 October 2011

The plaintiff, a passenger in a motor vehicle, claimed damages for injuries sustained as a result of the motor vehicle collision. Plaintiff subsequently amended the particulars of claim, whereupon the defendant filed a special plea, arguing that the plaintiffs claim as set out in the amended particulars of claim had prescribed. Plaintiff argued that the amended claim had not prescribed, as plaintiff sought to enforce the same deb t claimed in the summons prior to amendment [Paragraph 10].

Phatudi J held that the it was clear that the plaintiff had pursued a claim in terms of section 17(1) (a) of the Act, and that the initial particulars of claim had supported the claim envisaged. [Paragraph 16]. The amended particulars of claim continued to allege that the defendant was liable in terms of section 17(1)(a), but set out a "different cause of action with an element of unidentified motor vehicle as the cause of the accident." [Paragraph 18].

Phatudi J held that it was clear from the unamended summons that the plaintiff

"It is clear from the unamended summons that the plaintiff did not sue the defendant on the basis of unidentified motor vehicle. It is further clear that the plaintiff set out his cause of action in the particulars of claim relying on the provisions of section 17(1) (a)." [Paragraph 25]

"In my view, the amended particulars of claim introducing the new cause of action on unidentified motor vehicle is indeed tantamount to issuing of "new summons" for purposes of compliance with section 17(1)(b) read with regulation 2(1)(a) and (c" [Paragraph 26]

"It is further my view that the plaintiff failed to comply with the said provisions in that he failed to cause issue of summons in accordance with the provisions of regulation 2(1)(c)." [Paragraph 27]

"Based on the above, I find the plaintiff's claim to have prescribed." [Paragraph 29]

CRIMINAL JUSTICE

S V LR 2015 (2) SACR 497 (GP)

Case heard 2 December 2014, Judgment delivered 2 December 2014

A 16 year old child who had been driving without a licence, collided head on with another vehicle while overtaking illegally, resulting in a death. The presiding magistrate referred the child for diversion. The matter was then referred to the High Court as a special review, on the grounds that the presiding magistrate ought not to have referred the child for diversion as envisaged in terms of Child Justice Act.

Phatudi J (Msimeki J concurring) considered the aims of the Child Justice Act [Paragraph 5], and noted the circumstances under which a judicial officer could consider diversion [Paragraph 7]. Phatudi J held that the presiding officer had been "persuaded by the defence's submission that the child acknowledged responsibility for the offence", and had ordered the diversion "without considering the provisions of the Act." Phatudi J found that the presiding officer misdirected himself in accepting the child's acknowledgement of responsibility for the offence. [Paragraph 8].

"There is no evidence of either the deceased's family or any person with direct interest in the affairs of the deceased or of the police official responsible for the investigation of the matter demonstrating that they were consulted before diverting the matter. The evidence on record is just that of the prosecutor opposing diversion. The diversion ordered by the presiding officer is, on this leg as well, irregular." [Paragraph 9]

The order for diversion was set aside, and the matter was "referred to the Child Justice Court for the minor child to face the full might of the law." [Paragraph 15].

S v SHAI 2014 (1) SACR 204 (GNP)

Case heard 1 October 2012, Judgment delivered 8 October 2012

The appellant had been convicted in the regional court of the rape of a 13-year-old girl, and sentenced in the high court to life imprisonment. He appealed against the sentence.

Phatudi J (Hassim AJ and Molefe AJ concurring) held that the regional magistrate had acted correctly and done "her best" to inform and warn the accused of the applicability of section 51 of the Criminal Law Amendment Act (CLAA), and that the decision could not be faulted on that ground [Paragraph 15].

Regarding sentence, Phatudi J held that, considering the substantial and compelling circumstnaces recorded, the sentence imposed had been disproportionate [Paragraph 23].

"I accept the recorded circumstances that warrant imposition of a lesser sentence than the one prescribed by CLAA. I am of the view that the appellant's youthfulness and the period spent in custody while awaiting trial should have been added (which I now do) to the list of substantial circumstances compelling deviation from the prescribed sentence. Considering the testimony on the appellant's forgiveness by the members of his and the complainant's family, the reports filed and the recommendations, I am further of the view that the sentence imposed is disproportionate to the offence the appellant committed. The appeal against sentence stands to succeed. …" [Paragraph 24]

The life sentence was replaced by a sentence of 12 (twelve) years' imprisonment, which was antedated, and the prison authorities were ordered to deduct a period of two years from the sentence imposed, when calculating the date upon which the sentences imposed were to expire.

MEDIA COVERAGE

Quoted responding to an argument in the *Mansingh* case:

"In an unusual argument, IAASA argued that SC status should be retained as it 'intimidates' judges when advancing arguments in court. 'Do practising advocates really apply for the status of senior counsel with the purpose of intimidating judges? Do judges president and the Minister of Justice and Constitutional Development really recommend to the President to appoint senior counsel to intimidate judges? Judge Phatudi asked."

- Kim Hawkey, "Goodbye to silk?" *De Rebus* 1 March 2012 (available at http://www.derebus.org.za/goodbye-to-silk/).

JUDGE GEORGE PHATUDI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 8 March 1959

BIuris, University of Limpopo (1984)

LLB, University of Limpopo (1988)

LLM, University of Pretoria (1995)

CAREER PATH

Acing Deputy Judge President, Limpopo High Court (February – June 2019)

Judge, Limpopo High Court (2016 -)

Attorney and Director, M.G. Phatudi Incorporated (1999 – 2016)

Advocate (1996 – 1999)

Lecturer, University of the North (1989 – 1995)

Legal Advisor, Anglo-American Property Services Ltd (1986 – 1987)

Deputy Chairperson, Black Lawyers' Association (2001 – 2003)

Deputy Chairperson, Limpopo Law Council (2001 – 2002)

Member, Disciplinary Committee, Law Society of the Northern Provinces (2001 – 2016)

Arbitrator, Arbitration Foundation Panelist (2005 – 2009)

Commissioner, CCMA (1996 – 2000)

SELECTED JUDGMENTS

PRIVATE LAW

ISMAIL NO AND ANOTHER V ERF 87 DULLSTROOM CC (A357/2015) [2015] ZAGPPHC 835 (11 DECEMBER 2015)

Case heard 3 November 2015, Judgment delivered 11 December 2015

The appellants had instituted an action against the respondents in which they claimed the reduction of a purchase price, being the difference between the original price and the price that the appellants would have been willing to pay for the property, if they had been aware of a road reserve or servitude attached to the property.

Phatudi AJ (Jansen J concurring) held that it was trite law that the appellants could not rely on a "voetstoets" clause where the purchaser could establish that the appellant was aware of a latent defect in the property. [Paragraph 1.8]. After considering the meaning of a latent defect, Phatudi AJ found that it was common cause that the respondent had purchased the property in order to fully utilise it, and had caused plans to be drawn up by an architect for full utilisation. [Paragraph 3].

"The fact that the respondents were compelled to re-draw the initial plans to obviate the 397 m2 short fall … because of the road reserve, can only be indicative of the fact that no building could be permitted to be erected on the road reserve. In the premises, it follows that the defect occasioned by the road reserve constitutes a latent defect in the property sold of which the appellants were aware and failed to disclose to the respondents." [Paragraph 4]

Phatudi AJ agreed with the appellant's submission that it would have been legally impossible for them to have extended developments to the road reserve. "This … caused the respondent not only undue hardship, but also prejudice of a serious pecuniary nature. The road reserve thus constituted an "abnormal quality" which impaired the utility of the property". [Paragraph 10].

"… Where one party has knowledge not accessible to the other party, and where from the nature of the contract the latter … binds himself verbally or otherwise on the basis of the information communicated … the non-disclosure of any such fact is fatal. The contract is voidable at the instance of the aggrieved party because the risk run is in fact greater or different from the risk understood and intended to accept at the time of the agreement." [Paragraph 11.3]

Phatudi AJ held that the misrepresentation had been "conveyed intentionally" and had caused the respondent to act to its detriment. [Paragraph 12].

The appeal was dismissed with costs.

COMMERCIAL LAW

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA V FACTOPROPS 1052 CC AND ANOTHER [2015] 3 ALL SA 319 (GP)

Case heard 25 March 2014, Judgment delivered 20 May 2014

This case concerned the question of whether the interpretation and meaning of the word "mortgage bond" in the 1969 Prescription Act was wide enough to include reference to a Notarial Mortgage Bond. Applicants sought to amend their plea to incorporate a special plea of prescription.

Phatudi AJ held:

"… There are in our law, only four legislative enactments in place in so far as my memory can stretch, which makes reference to the concepts of "mortgage bond", "notarial contract", and "notarial bond". None of these measures, in my view, define quiet adequately the pure juridical meaning to be assigned to each for purposes of interpreting prescription of debts." [Paragraph 26]

Phatudi AJ held that, based on the language used in the Deeds Act and the Securities Act, a notarial bond which hypothecated corporeal and moveable property specified and described in the bond, could not constitute a mortgage bond. [Paragraph 31]. Phatudi AJ disagreed with academic opinion that the Prescription Act did not distinguish between different types of mortgage bonds, and held that prescription applied to the debt concerned, not to the mortgage bond itself.

"In consequence, where a mortage bond is registered after the due date of the debt, the usual prescriptive period applicable to that debt will apply … until the registration of the mortgage bond, when the 30-year period will find application. Accordingly, any period of prescription which has already begun to run, for instance 2 years before registration of the bond, will be taken into account, and the prescriptive period, after registration of the mortgage bond, will be a further 28-years period." [Paragraph 33.2]

Phatudi AJ held that a mortgage bond could not be equated to a notarial bond, and that the intention of the lawmaker had been "to maintain a distinction in respect of both character and the general purport of the two securities". [Paragraph 45]. Phatudi AJ then considered whether the debt in this case originated from a loan agreement or from a notarial bond, and found that the "nucleus" of the respondent's claim was founded on money lent and advanced to the applicant by the respondent, in terms of a loan agreement. [Paragraph 63]. Accordingly, the debt on which the respondent relied originated in the loan agreement. [Paragraph 73].

"… I come to the conclusion that there exists no real impediment why an amendment should not be permitted introducing the Special Plea of Prescription. Such an amendment, would in my view not be excepiable as disclosing no valid defence. I accordingly, do not hesitate to grant the application sought, and it is hereby granted." [Paragraph 95]

Applicants were granted leave amend their plea.

CIVIL AND POLITICAL RIGHTS

MEC FOR HEALTH, LIMPOPO v RABALAGO AND ANOTHER 2018 (4) SA 270 (LP)

Case heard 20 March 2017, Judgment delivered 20 March 2017

Applicant brought an urgent application for an interim interdict against the respondents. First respondent, who according to the judgment "describes himself as a 'prophet' and chairperson of the second respondent, a religious organization or church known as Mount Zion General Assembly" [Paragraph 8], was reported to have used "Doom insecticide to spray his congregants in order to heal members of his church assembly." [Paragraph 9.1]. Applicant cited inherent health risks if Doom were applied to humans. [Paragraph 10].

Phatudi J noted that each can of Doom contained several warnings of potential harm, as well as recommended precautions. [Paragraph 11]. Phatudi J noted the right to freedom of religion found in section 15 of the Constitution, as well as the respondents' reliance on section 31(1) of the Constitution, which allows for people to form cultural, religious and linguistic communities. [Paragraphs 18 – 20].

"It was … submitted on behalf of the respondents during argument that Doom was indeed applied or employed on specific congregants during the 'faith healing ministrations'; and that religious belief and faith healing are the reasons for spraying it (to 'pray for people as per 'instruction from God by the spirit'; 'God spoke to the first respondent on 18 November 2016 while in the church crusade at Mookgopong to conduct faith healing ministrations to the people.') It was further submitted of the congregants who submitted themselves to the spraying of Doom that their testimonies revealed that they were healed and delivered from sickness and various ailments that beset them. This spiritual intervention with healing powers from Doom or other media, descended as and when the spirit of God instructed the pontiff in his church assembly, crusades and other tabernacles of worship, to heal ailing members." [Paragraph 22].

Phatudi J analysed judgments of the Constitutional Court on freedom of religion, and held:

"… What … limits the right in ss 15(1) and 31(1) asserted by the first respondent, is the application and use of a toxic substance such as Doom spray on the human body contrary to the warnings on each can of Doom spray. I therefore venture to suggest that the legislation that prohibits misuse of such insecticides or pesticides as Doom spray on humans limits the very religious rights claimed by the first respondent under the Constitution. What then becomes paramount in this instance is whether the limitation is justifiable under s 36 of the constitution. … I am inclined to think that the use of Doom spray for alleged ceremonial or spiritual healing under the cloak of freedom of religion and worship cannot in my view, be left unlimited by s 36 proportionality analysis." [Paragraphs 34 – 35].

Phatudi J held further that there were no "watertight mechanisms in our law by which a law enforcement agent could distinguish" between "unorthodox ways of religious worship, which otherwise have a propensity of danger or harm", and "unconventional methods used for non-religious purposes." Phatudi J held that he would prefer to "err on the side of conservatism and carve a wide chasm limiting the scope and type of freedom of religion and belief entertained by the first respondent and his church assembly, and the s 15(1) and 31(1) rights." [Paragraph 36].

The interdict was granted.

CIVIL PROCEDURE

TAHO V PUBLIC SERVICES SECTOR EDUCATION AND TRAINING AND OTHERS (58602.2013) [2013] ZAGPPHC 453

Case heard 12 November 2013, Judgment delivered 21 November 2013

This was an application for an interdict, in which the applicants sought an order to set aside disciplinary proceedings initiated and conducted by the respondents.

Phatudi AJ dealt first with a question of whether the Labour Court enjoyed concurrent jurisdiction, and held that the question of whether the court had jurisdiction should be left to the court hearing the main application. [Paragraph 10].

"Put, differently, seeing that the Chirwa's case has removed the uncertainty on the issue of concurrent jurisdiction of the labour court, which is a court of equivalent jurisdiction with this court on labour matters, what, however, has not yet been settled is the question whether this jurisdictional power extends to the provisions of Section 31 of the SDA, which is part of the secondary dispute of the subject matter before this court. The moot point raised is, therefore, res nova in our constitutional jurisprudence after 1994, and accordingly requires a robust interrogation by our courts. Such interrogation, however, can in my opinion, not be conducted in an urgent court." [Paragraph 11]

"The preferred approach would be to grant interim relief where the damage or prejudice to the applicant by the refusal of the relief sought may be irreparable, and irreversible, even though the preponderance of success on the merits might be slim, and should ordinarily be granted where no harm would befall the respondents, and if it does, would be innocuous." [Paragraph 13]

Phatudi AJ held that the argument about jurisdiction during an interim relief application was "somewhat premature and ought not to arise at all." [Paragraph 14]. Phatudi AJ held that it was unclear whether the respondents taking issue with the question of locus standi was directed at the main application, or this interlocutory matter. If it was raised in relation to the main application, it was done so prematurely. [Paragraph 16]. Phatudi AJ held that the issue of locus standi was "not a prerequisite" for determining whether interim relief should or should not be granted on an urgent basis.

"Rule 6(12) of the Uniform Rules of Court set out squarely, the requirements of urgency, and what applicant is required to aver to set out explicitly, the circumstances giving rise to urgency. ... Counsel for respondents was not heard arguing forcefully the question of urgency in his submissions. If he did, then his submissions were planted in sandy soil, it could not germinate or it was simply not argument sufficiently persuasive to guide the court to a contrary view." [Paragraph 21]

The application was granted.

JUDGE RONALD HENDRICKS

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 11 December 1964

BLC, University of Pretoria (1988)

LLB, University of Pretoria (1990)

CAREER PATH

Acting Judge President, North West High Court (June 2012, August – December 2014, July – August 2016, June - September – 2017, March – April 2019)

Acting Deputy Judge President (June – September 2017, April – June 2018).

Acting Judge of Appeal, Labour Appeal Court (2010)

Acting Judge, Labour Court (2007)

Judge, North West High Court (2003 -)

Acting Judge, North West High Court (2003)

Acting regional court magistrate, Mmabatho (2000)

Advocate (1993 – 2003)

State advocate (1991 – 1993)

Regional Court prosecutor (1990)

Member, NADEL (2000 -)

North West Bar Association:

- Secretary (1997 – 1999)
- Vice chairman (2000 – 2001)

Member, African National Congress (1994 – 2003)

SELECTED JUDGMENTS

CRIMINAL JUSTICE

S v NKUNA 2012 (1) SACR 167 (B)

Case heard: 3 October 2005; Judgment delivered 17 November 2005.

The central question in this case was whether an accused could be convicted of murder in circumstances where the body of the deceased had not been found. No direct evidence was led and the state relied on circumstantial evidence for a conviction.

Hendricks J held:

"To require the production or discovery of the body (*corpus delicti*) in all cases would be unreasonable and unrealistic and, in certain cases, would lead to absurdities. To my mind it would lead to a gross injustice particularly in cases where a discovery of the body is rendered impossible by an act of the offender himself. … It is thus proper for a court to convict an accused on circumstantial evidence provided it has the necessary probative force to warrant a conviction, and the fact that death can be inferred from circumstances that leave no ground for a reasonable doubt. … It is not hard to think what the state of affairs would be in this country if the legal position were to be that, whenever a murder is committed and the body (*corpus delicti*) of a deceased is not found, the accused is then entitled to his acquittal; and that being so, despite the existence of overwhelming circumstantial evidence that points a finger to the accused person." [Paragraphs 111 – 113]

Hendricks J found that no evidence had been presented to suggest that the victim might still be alive [paragraph 141]. The accused was convicted of murder.

S V PILANE AND ANOTHER (CA 59/2009) [2010] ZANWHC 20 (17 SEPTEMBER 2010)

Case heard 20 August 2010, Judgment delivered 17 September 2010

The appellants had been convicted of fraud, theft and corruption in the Regional Court. In respect of the fraud charge, the first appellant was alleged to have given out to the Land and Agricultural Bank that the *Bakgatla-Ba-Kgafela* Tribe would receive an annual income of over R6 million, and that he was authorised to act on behalf of the tribe, whereas he knew that this income would not be received, and/or he knew that he was not authorised to act on behalf of the tribe in entering into a loan agreement.

Hendricks J (Kgoele J concurring) held that an analysis of the relevant application forms indicated that "no such representation had been made", and that "reading the documents as a whole, this misrepresentation could not have been made", and that the Land Bank had never been under the impression that such a representation had been made. [Paragraph 12]. Hendricks J held further that the court *a quo* had convicted the first appellant on the basis of a different case to what he had been chared with [Paragraph 18]. Hendricks J held that it was "abundantly clear that the misrepresentation was premised on the fact that the First Appellant omitted to state that the royalties, as any income for the tribe, was pledged to Anglo American Platinum Corporation", and

that the first accused had not been charged with failing to disclose to the Land Bank that the royalties due to the tribe were indeed pledged. Hendricks J held that the process followed, whereby the charge sheet had been amended shortly before judgment, was prejudicial to the accused, and amounted to a "trial by ambush". [Paragraphs 26 - 29].

Hendricks J then turned to consider the theft charges, finding that there was no evidence to counter the argument that the money received from the loans from the Land Bank was "used for, or on behalf of the tribe". [Paragraph 31]. Hendricks J held that:

"… [N]o pertinent evidence of the unlawfulness of the First Appellant's dealings with the monies of the tribe / trust, or of his intention to unlawfully appropriate such monies for himself, was presented. … This is unsurprising in that the State premised the prosecution of all counts on the monies involved being dealt with strictly in accordance with the dictates of Section 11 of the Bophuthatswana Traditional Authorities Act … as a matter of legal obligation." [Paragraphs 36 – 37].

Hendricks J found that it was "not necessary that a trust of a company conduct business in accordance with Section 11 when the monies in question are not provided by the State but involve a commercial concern." [Paragraph 38]. Hendricks J characterised the "essence" of the State case on this aspect as being that the first accused could not spend his own money on behalf of the tribe and then refund himself by a withdrawal "from the trusts' coffers", which were only accessible through a so-called "section 11 account", which required certain procedures to be followed. The state argued that failure of the First Appellant to follow these procedures "evidenced sufficiently in itself the unlawful appropriation of these monies." [Paragraph 39]. Hendricks J rejected this argument, finding that no-one had been able to testify on behalf of the tribe that the amounts had indeed been stolen, [Paragraph 50], and rejected the court *a quo's* finding that the first appellant had been an untruthful witness [Paragraph 51].

Whilst noting that "[m]uch criticism can be levelled [sic] against the manner in which the First Appellant as the person in charge of the tribes' money, administered it", and that "[t]here is great suspicion that funds may have been misappropriated in the process", Hendricks J found that the appellant's guilt had not been proved beyond a reasonable doubt, and the appeal thus succeeded. [Paragraphs 89 – 93].

The judgment has been criticised by **Aninka Claassens and Boitumelo Matlala ["Platinum, poverty and princes in post-apartheid South Africa: new laws, old repertoires", *New South African Review* 4 (2014), 117**]. The authors argue that:

"The judgment does not include an explanation of the reasoning that motivated the judge's interpretation of section 11(2)(d). That section, on the face of it, is all-encompassing. It applies to 'all other amounts derived from any source whatsoever' and includes money from the state only as a sub-category. Under the circumstances, the conclusion that the section applies only to monies provided by the state is mystifying.

This judicial interpretation of section 11 has had very far-reaching repercussions. It was pivotal to the setting aside of the fraud and theft convictions of Nyalala Pilane and Koos Motshegoe, and has been relied on by the Department of Cooperative Governance and Traditional Affairs (COGTA) in the

North West in justifying its hands-off approach in relation to subsequent and repeated complaints of financial mismanagement against Nyalala Pilane. The BDO Spencer audit report is testimony to the serious financial consequences for the community, including unaudited books of account since at least 2008.

Most striking is the consequence that Nyalala Pilane and the Bakgatla ba Kgafela Traditional Council are effectively insulated from the financial oversight provisions of the very laws that provide them with statutory authority and official status. …" [Page 131].

The report of the **Commission into Traditional Succession Disputes and Claims: Bakgatla Ba Kgafela Traditional Community (20 August 2019)** found that:

"Kgosi Pilane has caused that the monies of the community are administered from bank accounts not authorised in terms of sec 30 of the NW Act [the successor section to section 11 of the Bophuthatswana Traditional Authorities Act]. He has failed to ensure that the TC administers the finances of the community in accordance with sec 30(1) of the NW Act." [Paragraph 4.7, Page 20. The report is available at http://www.saflii.org/images/baloyi.pdf].

CUSTOMARY LAW

PILANE AND ANOTHER V PHETO AND OTHERS (582/2011) [2011] ZANWHC 63 (30 SEPTEMBER 2011)

Case heard: 11 August 2001; Judgment delivered: 30 September 2011

Respondents has placed a newspaper advertisement calling on members of the Bakgatla – Ba – Kgafela Royal Family to attend an urgent meeting. Applicants sought to interdict the meeting. Respondents brought a counter – application to compel the applicants to submit financial documents, and to refer the matter to the Premier to appoint a commission of inquiry into allegations of financial maladministration b the Applicants. At issue was whether respondents were members of the Royal Family, and thus whether they were entitled to call a meeting of the Royal Family.

Hendricks J found that:

"Adopting a robust approach to the issues in dispute, it is abundantly clear that the Respondents are not members of the inner circle or core of the Royal Family of the Bakgatla-Ba-Kgafela tribe and also not royalty." [Paragraph 24]

"Being debarred from holding community meetings, the Respondents holds themselves out as members of the Royal Family … and attempt to, under the disguise of being the Royal Family, to hold a meeting in an attempt to circumvent the court order prohibiting them as individuals to hold a tribal community meeting. …" [Paragraph 32]

"Whilst everybody and anybody has the right to call a meeting and enjoys freedom of association, nobody is allowed to call a meeting for and on behalf of an entity or body corporate whilst he/she does not have the necessary *locus standi* to do so. The Respondents who are not core members of the Royal Family cannot call a meeting under the guise of the Royal Family and even hold out in an advertisement that the First Respondent … is the chairperson or chairman when in fact this is not the case. Without any stretch of the imagination, the placing of this advertisement was intended to create confusion amongst members of the tribal community of the Bakgatla-Ba-Kgafela tribe who the Royal Family is and who has the right to call a meeting." [Paragraph 39]

The interdict was granted, and the counter – application dismissed. On costs, Hendricks J held:

"[T]he Respondents weren't candid with this Court. Furthermore, it is quite apparent that the Respondents are doing everything within their means to unseat and undermine the authority of the Applicants and to litigate as often as possible in an attempt to create confusion within the tribe. This behaviour borders on being vexatious. This, to my mind, calls for a punitive costs order. In my view too, the complexity of this matter is not questionable, this was the view of counsel for both the Applicants and the Respondents." [Paragraph 55]

Respondents were ordered to pay costs on an attorney and client scale.

The judgment has also been criticised by **Claassens and Matlala ["Platinum, poverty and princes in post-apartheid South Africa: new laws, old repertoires", *New South African Review* 4 (2014), 117**], who argue that:

"Judge Hendricks found that Nyalala Pilane, being 'the nominated representative of the *kgosikgolo* in South Africa, has the necessary standing and clear right as a member of the royal family, as defined in terms of Bakgatla custom and law, to bring this application.' This is a disconcerting and novel interpretation of customary law – that membership of a royal family, and chiefly status depends on the discretion of a 'paramount' based in another country. … Judge Hendricks's interpretation has far-reaching consequences for the concept and exercise of chiefly accountability. In effect it means that a traditional leader such as Nyalala Pilane cannot be held accountable by anyone in the customary community, including his royal family, apart from a more senior traditional leader. This flies in the face of a wide-ranging historical and anthropological literature about the role of councils and interlocking customary structures at various levels in mediating and shaping the exercise of chiefly power …" [page 129].

ADMINISTRATION OF JUSTICE

LAW SOCIETY OF THE NORTHERN PROVINCES V GABARONE MOTHOGAE & ANOTHER [2007] JOL 19024 (B)

Case heard 24 November 2005, Judgment delivered 12 January 2006.

Applicant sought an interim order, suspending the first respondent from practising as an attorney. Respondents argued *in limine* that applicant lacked *locus standi*; that section 84A of the Attorneys

Act was unconstitutional; and that the Bophuthatswana Law Society had exclusive jurisdiction over the first respondent.

Hendricks J dismissed all three points in *limine:*

"It is contended ... that section 84A is unconstitutional and invalid because it unfairly discriminates against attorneys belonging to the Bophuthatswana Law Society in that, they are subjected to the control and regulation of two Law Societies, quite different from their counterparts who belongs to Law Societies of the then Republic of South-Africa, which did not fall under the former homelands."

"I am unconvinced that the dual membership amounts to unfair discrimination.

The fact that two Law Societies have concurrent jurisdiction over an attorney and exercise control over such attorney is in my view not discriminatory. Either of the two Law Societies may take action or appropriate steps against a member. ... If however, these Law Societies take separate action against an attorney, for the same misconduct, such an attorney will have the appropriate remedies or defences at his or her disposal." [Pages 11-12]

"Although it might be said that the regulation of an attorney who practices in the territory of the former Republic of Bophuthatswana is a little complicated and not altogether satisfactory, because of the concurrent jurisdiction over such an attorney also by the Law Society of the Northern Provinces, I am of the view that it is not unconstitutional. I also do not agree with the contention that such an attorney is at a disadvantage, as compared to his/her counterparts in the areas of the Republic of South Africa which did not fall under the erstwhile homeland areas." [Pages 13-15]

MEDIA COVERAGE

Commentary on the judgment in the *Coligny* murder case:

"Alert readers will note that Pakisi's [a witness in the trial] most spectacular flip-flops — changing the time of the murder from 9am to 7am, and elevating the number of attackers from two to three — are not mentioned here. Indeed, they never made it into Hendricks' judgement in any form. This was the fruit of keeping investigating officers Nkosi and Sepongang off the witness stand; it allowed howling contradictions to be pushed into the deep background, which in turn enabled Hendricks to reach his most important conclusion: "The evidence of Mr. Pakisi is honest, truthful and reliable." ...

"So many doubts, so many unanswered questions. In the end, Hendricks seemed to be swayed above all by the literary merits of Pakisi's tale. "One thing that needs special mention," he said, "is that Mr. Pakisi describes different scenes and everything that happened at those scenes. One can think of no cogent reason why Pakisi were to be so innovative if it did not in fact happen. This is almost rocket science." On this basis the accused were both found guilty, and sentenced to long prison terms yesterday."

- Rian Malan, "The curious case of the Coligny trial", *Politicsweb* 7 March 2019 (available at https://www.politicsweb.co.za/opinion/the-curious-case-of-the-coligny-trial).

"SKIERLIK JUDGE A HIT", *NEWS24* 23 NOVEMBER 2008 (available at http://www.news24.com/SouthAfrica/News/Skierlik-judge-a-hit-20081123)

"Mmabatho High Court Judge Ronald Hendricks, 45, is fast becoming the darling of crime victims. ... He is the same judge who sent William Nkuna to life in prison for killing Constable Francis Rasuge. The mystery surrounding her disappearance kept the nation enthralled.

Nkuna, her boyfriend, was the main suspect.

Hendricks was not afraid to label him a blatant and pathetic liar.

Rasuge's body has still not been found.

This week, all eyes were on Hendricks when he had to decided the fate of Johann Nel, 19, who went on a shooting spree at the Skierlik informal settlement and killed four people including two children aged ten years and four months.

In spite of a barrage of death threats warning him not to send Nel to jail, he sentenced the teenager to 176 years in jail.

In passing sentence Hendricks confirmed that the motive for the killing was that the victims were black.

"He is a no-nonsense man," described one policeman who claimed to have had the privilege of listening to almost all of his judgments.

A security officer at the court described him as a polite and humble judge "who goes about doing his job".

"What I have noticed about him is, he doesn't forget people's names and when he passes you, he always makes sure that he greets and looks at you in the eye," said the security officer.

On Friday he restored the faith of the community of Skierlik by "delivering a bold and strong judgment".

The court manager, Simon Masisi, who has know Hendricks for 10 years described him as a versatile, not-status orientated family man and very religious."

ADVOCATE DIANE DAVIS SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 7 April 19656

BA, University of Cape Town (1985)

LLB, University of Cape Town (Magna cum laude) (1987)

CAREER PATH

Acting Judge, Western Cape High Court (October 2012 – September 2013, October 2017 – September 2019)

Advocate (1994 to date, appointed senior counsel 18 March 2018)

Professional Assistant, Mallinicks Attorneys (1991 – 1993)

Candidate Attorney, Mallinicks Attorneys (1989 – 1991)

Member, General Commercial Panel of Arbitrators, Arbitration Foundation of South Africa (2006 -)

Member, Chartered Institute of Arbitrators (United Kingdom) (2008 – 2017)

Accredited Mediator, Africa Centre for Dispute Settlement (2010 – 2011)

Associate, Association of Arbitrators Southern Africa (2010 -)

Accredited Civil and Commercial Mediator, ADR Group (United Kingdom) (2009 – 2011)

Member, Law Society of England and Wales (2009 -)

SELECTED JUDGMENTS

COMMERCIAL LAW

ABSA BANK LIMITED V TERBLANCHE(17330/2012) [2012] ZAWCHC 369 (30 NOVEMBER 2012)

This case concerned an application for summary judgment in which the plaintiff claimed payment from the first and second defendants, who were husband and wife married out of community of property, jointly and severally of an amount in respect of money loaned and advanced against three mortgage bonds. Defendants raised defences relating to agency and securitization.

Regarding agency, it was argued that the agreements relied on by the plaintiff were invalid. Davis AJ noted that the defendants alleged that the agreements relied on were invalid, but that they did not deny that the plaintiff had advanced money to them, nor did they deny that they had acquired property on the strength of that mortgage loan. Defendants argued that the plaintiff was not the institution which advanced the monies to them, as the monies belonged to the Reserve Bank, and therefore the Reserve Bank had locus standi to enforce the claim, as "the plaintiff was at all times acting merely as the agent of the Reserve Bank." [Paragraph 7]

Davis AJ held:

"The defendants provide no basis or support whatsoever for the bald factual allegations made in …their affidavit about complex matters of banking which one would not expect to fall within the ambit of the personal knowledge of the average consumer. Without a basis being laid for this specialist knowledge, I cannot but entertain serious doubts whether the defendants have the professed personal knowledge of these facts, and therefore whether the defence is put up in good faith. …" [Paragraph 8]

Davis AJ found that the allegation that the Reserve Bank, rather than the Plaintiff, loaned moneys to the defendant was contrary to the clear wording of the agreements [Paragraph 9], and that the agency defence was based "on several flawed premises", and was not good in law. [Paragraph 10 – 14]. Similarly, Davis AJ held that the agency defence was based on allegations concerning facts that did not fall within the personal knowledge of the defendants. There was no evidence that the agreements had been ceded to a third party. [Paragraph 17].

"Summary judgment, where a plaintiff is otherwise entitled thereto, ought not to be refused merely because the defendant wishes to embark upon a fishing expedition in the hope of coming up with a defence. … [T]he securitization defence was knowingly put without any factual basis therefore, and that the defence cannot therefore be said to be advanced in good faith…" [Paragraphs 19-21]

Summary judgment was granted.

GOBEL V GOBEL (6935/13) [2013] ZAWCHC 91 (28 JUNE 2013)

Case heard 11 June 2013, Judgment delivered 28 June 2013

This was an urgent application for the sequestration of the respondent's estate. The applicant and the respondent were engaged in divorce proceedings in which the applicant claimed, *inter alia,* payment of lifelong maintenance from the respondent. Applicant also sought interim interdictory relief preventing the respondent from encumbering or disposing of assets in his estate in the event that the application was postponed. Respondent opposed the application on the grounds that the applicant lacked locus standi, that there was no insolvency, and that the application was brought for an ulterior purpose and was an abuse of process.

On the issue of *locus standi*, Davis AJ held that the applicant's claim was "at best conditional and un-quantified", and did not qualify as a liquidated claim. [Paragraphs 8 – 9]. Davis AJ found that the respondent's financial position was "in flux" and that his liquidity problems were due in part to the "acrimonious divorce". The respondent's ability to earn a living would likely be impaired if his estate was sequestrated, and concluded that "it would be premature and unduly prejudicial to respondent" to grant a provisional sequestration order. [Paragraphs 25-43]

On the issue of abuse of process, Davis AJ found that correspondence from the applicant to the respondent was "indicative of an attempt to bully the respondent into giving in to her demands using the threat of sequestration as a weapon" [Paragraphs 52-53], and that "the applicant's objective in launching the present application was not a *bona fide* attempt to bring about a sequestration of the respondent's estate for its own sake, but a tactical manoeuvre aimed at pressuring the respondent into settling the divorce on her terms." The application was thus found to have been brought for an ulterior motive, and fell to be dismissed as an abuse of process. [Paragraph 54]

Davis AJ found that as the application was an abuse of process on two grounds, it was fair and appropriate to grant costs on an attorney and client scale. The application was dismissed. [Paragraphs 64 – 65].

CIVIL PROCEDUE

GREEF V COOPER AND OTHERS (A176/2018) [2018] ZAWCHC 170; 2019 (3) SA 203 (WCC) (18 SEPTEMBER 2018)

The issue in this appeal was whether it was legally competent to interdict compliance with a Magistrates' Court subpoena *duces tecum* on the basis that it was an abuse, instead of applying to set aside the subpoena. Appellant's attorney had issued a subpoena against the second respondent (ABSA) requiring the production of bank statements and credit applications by first respondent (the father of the third respondent) and the third respondent. The case dealt only with the subpoena issued against the first respondent, who had brought an urgent application to interdict ABSA from filing bank statements in terms of the subpoena, alternatively to set the subpoena aside. The interdict was granted in the Magistrates' Court.

On appeal, Davis AJ (Dolamo J concurring) held that the Magistrates' Court had no general power to set aside a subpoena. By contrast with the high court, it had no inherent jurisdiction to set aside a subpoena on the grounds that it was vexatious or amounted to an abuse of process. A litigant wishing to do so would have to approach the high court [Paragraph 27]. Davis AJ held further that whilst the relief sought by the first respondent relief was framed as an interdict, the application was "in substance and effect" an application to have the subpoena set aside, which a Magistrates' Court could not grant [Paragraph 31]. Davis AJ noted that the first applicant had relied on a breach of the right to privacy, and held:

"The right to privacy is not unlimited. All things being equal, requiring citizens to give material evidence or produce relevant documents at court in terms of the statutes governing subpoenas constitutes a legitimate limitation of the right to privacy. …" [Paragraph 33]

Davis AJ held that framing the relief as an interdict was misconceived, as interdicting compliance with lawful process was "counter-intuitive". A subpoena was lawful process that must be complied with until set aside by a competent court. [Paragraph 35] If a subpoena could not be set aside by a magistrates' court on the grounds that it was an abuse, neither could compliance with a subpoena be interdicted. The proper remedy for a Magistrates' Court subpoena alleged to be an abuse of process would be to apply to the High Court to set aside the subpoena. [Paragraphs 36 – 37].

The appeal was upheld and the application dismissed.

MANWOOD UNDERWRITERS (PTY) LTD AND OTHERS V OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED [2013] 1 ALL SA 701 (WCC)

Judgment delivered 5 December 2012

Plaintiff applied for leave to amend its particulars of claim under rule 28(4) of the Uniform Rules of Court. Second and third plaintiffs had entered into an investment contract with the defendant, and claimed for an amount alleged to be due to them in terms of the contract (the encashment value). Plaintiffs initially based their claim on the investment contract alone, and defendant denied that proper notice of encashment had been given in terms of the contract. Plaintiffs then sought to amend their particulars of claim, to the effect that, if the notice were found not to be valid, defendant had waived strict compliance with the notice requirements and was estopped from relying on them; alternatively that the defendant had breached the contract by making negligent representations to the plaintiffs. Defendant also argued that the claim had prescribed.

Davis AJ noted that it was common cause that the investment contract was governed by the law of Guernsey [Paragraph 12]. After citing SCA jurisprudence to establish that procedural matters were determined under the law of the country where the dispute was heard (*lex fori*), while substantive matters were determined under the law governing the underlying transaction (*lex causae*), Davis AJ continued:

"The characterisation of an issue as procedural or substantive has traditionally been done solely according to the law of the lex fori. In Price, however, the Supreme Court of Appeal endorsed the

application of a via media approach to characterisation, which involves a consideration of both the rules of the lex fori and the lex causae pertaining to classification. …" [Paragraph 14]

Davis AJ held that the application of the via media approach required that there be evidence before the court of the relevant foreign law rules, but that in this case there was no evidence as to the content of Guernsey law. The relevant issues therefore had to be classified in terms of the lex fori. [Paragraph 15].

Davis AJ then considered the law applicable to the prescription claim, and noted that South African law had traditionally distinguished between prescription statutes which operate to extinguish rights, "and those which merely bar a remedy by imposing a procedural limit on the institution of action to enforce the right." The former were regarded as substantive, and the latter as procedural. The Prescription Act meant that prescription in South African law was classified as a matter of substantive law, and thus was not a matter for the lex fori. The Prescription Act therefore did not apply. [Paragraph 22]

Davis AJ held that it was therefore necessary to look to Guernsey law to ascertain whether prescription is regarded as substantive (in which case Guernsey law would apply) or procedural in Guernsey. If characterised as procedural, "one will be faced with the conundrum of the "gap" … where the lex fori, being substantive, does not apply, and the lex causae, being procedural, also does not apply." [Paragraph 23] Davis AJ found that due to the absence of evidence regarding the content of Guernsey law, it was not possible to determine whether prescription in Guernsey was classified as procedural or substantive, and if substantive, whether the claim had prescribed under Guernsey law [Paragraph 24].

"In these circumstances, I consider that it would be wrong for me to close the doors of the court on the plaintiffs by disallowing the amendment. … I, therefore, consider that the objection based on the prescription point must fail and the negligence part of the amendment allowed." [Paragraphs 26, 28]

Davis AJ then considered the amendment regarding waiver and estoppel, and held that there could be no objection to a plaintiff alleging in its particulars of claim that a condition or requirement in a contract, which would otherwise be destructive of any right of action based on the contract, has been waived by the defendant, and that there was no reason why, in such a situation, estoppel could not be pleaded in the alternative." [Paragraph 36] Subject to one deletion due to lack of particularity, leave to amend was granted. Applicants (plaintiffs) were ordered to pay costs [Paragraph 47].

CRIMINAL JUSTICE

KRUSE V S (A100/2018) [2018] ZAWCHC 105; 2018 (2) SACR 644 (WCC) (27 AUGUST 2018)

Case heard 4 May 2018, Judgment delivered 27 August 2018.

The was an appeal against a conviction for murder. The accused, who was deaf, had indicated at the outset of the trial that he could not understand the sign language interpreter effectively. [Paragraphs 10 – 11]. The magistrate directed that communication with the accused take place in

writing [Paragraphs 13 - 14].

Davis AJ (Ndita J concurring) held that the appeal "highlights the need for judicial sensitivity and vigilance in criminal proceedings involving an accused with impaired hearing and speech, as well as the duty of judicial officers to treat all persons who come before court with due respect for their dignity." [Paragraph 1]. Davis AJ held that effective communication was imperative for a fair trial, and that "it is widely accepted that the ability of an accused person to understand and be understood are fundamental requirements for a fair trial." [Paragraphs 4 – 5].

Davis AJ held further that fair trial rights provided a significant challenge in respect of an accused whose hearing and/or speech was impaired, as there was "a grave danger" that the accused "could be excluded from meaningful participation in the trial." [Paragraph 6]. It was therefore necessary for the presiding officer to be satisfied that the accused was able to hear and understand the proceedings at all times, and to make themselves understood. It would be insufficient to "simply accept the word of a legal representative in this regard". Where there was "any inkling" that an accused might have hearing and/or speech difficulties, an expert assessment would be required into the extent of the accused's impairment and, potentially leading to the employment of an appropriately qualified interpreter to ensure that the accused was able to participate fully in the trial [Paragraphs 7 – 8].

Davis AJ found that there were numerous difficulties with the approach employed in the instant case, as "the interpretation was sub-standard since it was not continuous, precise, competent and contemporaneous" [Paragraph 15], and that "[t]he record gives rise to grave doubts about the efficacy of the accused's understanding and communication." [Paragraph 17]. Davis AJ found that:
"The procedure adopted by the magistrate was not sufficient to ensure that the accused was able to participate effectively in his trial. It is clear from the record that the accused struggled to hear and to follow the proceedings. During the presentation of the State's case he was effectively excluded for large portions of the trial since as he was not given a contemporaneous interpretation of the dialogue. …" [Paragraph 19].

Davis AJ also censured the presiding magistrate for forming a sceptical view of the accused's disability:
"The magistrate's remarks display an appalling insensitivity and prejudice regarding the accused's disability. She violated his dignity with her callous laughter and open incredulity. She failed to accord him the respect which every person who appears in a South African court is entitled to receive from a judicial officer. Her conduct demonstrates the need for ongoing social awareness and sensitivity training to alert all judicial officers to the challenges facing people with disabilities when they appear in our courts." [Paragraph 26].

Davis AJ held that the accused had not been afforded a fair trial [Paragraph 28]. The appeal was upheld, and the conviction and sentence set aside.

BRINK V S (A320/2017) [2018] ZAWCHC 56; [2018] 2 ALL SA 347 (WCC); 2018 (2) SACR 6 (WCC) (13 MARCH 2018)

The issue in this appeal was whether a subsection conviction under a different subsection of the same section of the National Road Traffic Act qualified as a second offence for the purposes of the suspension of a driving license under the Act. Based on statements by the accused during the hearing, the Magistrate had concluded that the accused had been convicted of an alcohol-related offence in 2015, despite the offence not featuring in the SAP form in evidence. This meant that the accused was found to have three relevant convictions, and it was ordered that his license be suspended for 10 years.

Davis AJ (Allie J concurring) declined to follow the interpretative approach in the earlier case of Van Rooyen, on the basis that the court had not followed the correct approach to statutory interpretation. [Paragraphs 25 – 27]. Davis AJ held that section 35(1) of the Act provided for progressively longer periods of suspension in the case of repeat offenders, for the "obvious reason" of protecting the public "by removing dangerous road users who have not been deterred or corrected by previous punishment." [Paragraph 33]. Davis AJ noted that the provisions of section 35(1) which attract a minimum mandatory license suspension were grouped in four categories according to the nature of the offence, and held that:

> "It is significant that the offences referred to in section 35(1) are grouped in subsections … according to type rather than being listed individually. This suggests, to my mind, that the emphasis is on the nature or type of the offence rather than the particular elements of the offence." [Paragraphs 35 – 36].

Thus, Davis AJ thus held that the relevant question when determining whether an offence was a first, second or third offence for purposes of section 35(1) was whether the offence fell under the relevant subsections, and not whether it fell under "an identical statutory provision." [Paragraph 37].

"To my mind this interpretation of section 35(1) honours the text and promotes what I consider to be the clear purpose of the provision, namely to protect the public from road users who pose a risk because they have a tendency for certain dangerous conduct. Repeat offences attracting heavier penalties are determined with reference to multiple related offences which go to show a particular propensity in the offender – such as drunken driving or perilous speeding." [Paragraph 39].

Davis AJ found that the accused's evidence regarding the 2015 conviction was insufficient to constitute proof of the offence beyond a reasonable doubt, and therefore that only one previous convictions could be taken into account. The prescribed minimum period of suspension was therefore five years. [Paragraphs 49 - 51] Davis AJ found that no substantial and compelling circumstances existed to justify not imposing the prescribed minimum sentence. [Paragraphs 52 – 65]. The appeal was upheld, and the sentence of ten years' suspension of the accused's drivers license was replaced with a suspension of five years. [Paragraph 66].

MEDIA COVERAGE

Findings reported from an independent investigation into allegations of racial and verbal abuse by a hostel superintendant at Wynberg Girls' High School:

"After interviewing a wide cross section of learners and hostel staff, Advocate Diane Davis submitted a written report to the School Governing Body containing her findings and recommendations.

"The chief finding in the report is that the Hostel Superintendent has not broken the law. More particularly, she has not committed sexual assault or harassment, emotional abuse, theft, hate speech, racial discrimination or unlawful breaches of confidentiality or privacy, all of which she stood accused of by certain learners in Waterloo House.

"Advocate Davis found that the learners at Waterloo House had a legitimate cause for complaint, however, regarding inconsistent treatment and the lack of a uniform set of rules and disciplinary code. This situation lent itself to unfortunate misperceptions which, while unfounded in fact, were the cause of understandable unhappiness.

She also found that there had been a breakdown of discipline in the hostel, and that the re-establishment of good discipline and order at Waterloo House needs to be addressed as a priority."

Recommendations made in the report include: the appointment of a Xhosa speaking Hostel Superintendent; the preparation of a revised disciplinary code which sets out clear rules; and bringing in professionals to work with the hostel learners and hostel staff in an effort to promote better understanding in the hostel for the benefit of all its learners.

- "Cape Town school hostel superintendent is out of a job - despite being cleared of racial discrimination, *TimesLive* 9 February 2017 (Available at https://www.timeslive.co.za/news/south-africa/2017-02-09-cape-town-school-hostel-superintendent-is-out-of-a-job---despite-being-cleared-of-racial-discrimination/).
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ADVOCATE DEIDRE SUSAN KUSEVITSKY

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 6 February 1972

LLB, University of the Western Cape (2002)

LLM, University of Western Cape (2005)

Certificate in Medical Negligence Law, University of Cape Town (2012)

Certificate in Mediation, London School of Mediation (2013)

Certificate in Introduction to Corporate Governance, Institute of Directors Southern Africa (2015)

Certificate in Arbitration, The Arbitration Foundation of Southern Africa)2015)

CAREER PATH

Acting Judge, Western Cape High Court (April – June 2017; July – September 2017; October – December 2017; January – March 2018; April – June 2018; July – September 2018)

Advocate, Cape Bar	(2003 –)
Candidate Attorney, Smith Tabatha Buchanan Boyes	(2000 – 2003)
In-house Counsel, Standard Bank of South Africa	(1996 – 2000)

Member, General Council of the Bar	(2003 –)
Ordinary Member, Cape Bar Council	(2017 – 2018)
Member, Cape Law Society	(2000 – 2003)

Chair of the Women's Hope Education and Training Trust ("WHEAT") (2018 –)

Acting Chair, WHEAT Trust	(2017)
Member of the Board of Trustees at WHEAT	(2016)

SELECTED JUDGMENTS

PRIVATE LAW

CLARKE V MEC FOR HEALTH WESTERN CAPE AND ANOTHER (13724/14) [2018] ZAWCHC 64 (8 MARCH 2018)

Case heard 5 June 2017, Judgment delivered 8 March 2018

The Plaintiff brought an action against the Defendants arising out of injuries allegedly sustained by her when she underwent a laparoscopic cholecystectomy, which was converted into an open cholecystectomy. The Plaintiff alleged that during this operation, the surgeons negligently and in breach of their duty of care caused an injury to the Plaintiff's colon, which later resulted in the perforation of the colon.

After hearing the expert witnesses, Kusevitsky AJ found that the experts held two opposing views. Based on *Mitchell v Dixon, Maitland and Kensington Bus Co (Pty) Ltd v Jennings, Medi-Clinic v Vermeulen* and *F M v Member of the Executive Council, Department of Health, Eastern Cape*, Kusevitsky AJ concluded that the Court had to decide whether one view was more probable than the other. [Paragraphs 77 - 82] Kusevitsky AJ concluded that on every point where negligence was suggested, the evidence was in favour of the Defendants, "that being the expert qualifications of the surgeons; the agreement that if they did not see ask anything, then nothing could be repaired; the concession that if it was a serosal injury that it would be an acceptable complication; and the concession that it was unlikely that Mr Bhaila would have missed an injury during the open phase of the operation." [Paragraph 94]

Kusevitsky AJ therefore concluded that the Plaintiff failed to prove negligence on the part of the Defendants, and dismissed the claim with costs. [Paragraph 100]

ADMINISTRATIVE JUSTICE

JOCASTRO (PTY) LTD V EKURHULENI METROPOLITAN MUNICIPALITY AND OTHERS; JOCASTRO (PTY) LTD V EKURHULENI METROPOLITAN MUNICIPALITY AND ANOTHER (9466/2017) [2018] ZAWCHC 44 (11 APRIL 2018)

Case heard 26 October 2017, Judgment delivered 11 April 2018

This was a review of a procurement process. The court had to decide whether the use of the term 'acceptability' as a requirement was too vague and therefore manipulated the outcome of tenders.

Kusevitsky AJ decided to consolidate two cases since both of them provided the same facts and legal issues. [para 3] The Applicant's tender in both cases were rejected on the bases of the 'acceptability' requirement.

After analysing the legislative framework, the judgments in *AllPay Consilidated Investment Holdings (PTY) LTD and Others v Chief Executive Office, SASSA and Others*, section 217 of the Constitution, section 6 of PAJA and the Preferential Procurement Police Framework Act 5 of 200 (PPPFA) [paragraphs 16 - 22], Kusevitsky AJ agreed with the submissions by the Applicant that "acceptability" requirements were assessed on a pass/fail basis rather than the points system prescribed by the PPPFA regulations. [Paragraph 46]. Based on the fact that twelve out fourteen bids were excluded because they did not provide information relating to technical ability and were therefore not "acceptable", Kusevitsky AJ held that such a tender process was not in accordance with section 217(1) of the Constitution. [Paragraphs 46 - 48]

Kusevitsky AJ held further that is would be unjust to favour the Applicant on the basis that it had asked for a review of the Municipality's decision. Therefore, the tender processes in both cases was set aside and remitted back to the First Respondent. [Paragraph 50]

CIVIL PROCEDURE

SWANEPOEL AND OTHERS V SWANEPOEL (18211/2017) [2017] ZAWCHC 154 (13 DECEMBER 2017)

Case heard 27 October 2017, Judgment delivered 13 December 2017

This was an application in terms of section 18(1) and (3) of the Superior Courts Act that an order granted on 17 September 2017 by Kusevitsky AJ not be suspended by the application for leave to appeal lodged by the Respondent. The applicant also sought to ensure that the order granted would continue to be operational and enforceable until the final determination of all present and future applicantions and appeals in respect of that order. Applicants, who had been involved in an ongoing dispute with the respondents, had been arrested in the DRC, seemingly as a result of represetnations made to authorities there by the respondents. The order of 17 September 2017 required the respondents, inter alia, to communicate the withdrawal of various allegations to the authorities in the DRC. [Paragraphs 3 – 7].

After considering the applicable law, Kusevitsky AJ focused on section 18 of the Act and the requirements of "exceptional circumstances" and "irreparable harm" under section 18(1) and (3). [Paragraphs 38 - 42] Kusevitsky AJ held that:

> "The threat to one's personal freedom, notwithstanding the fact that it is an enshrined right in our Bill of Rights, in my view constitute exceptional circumstance as envisaged in the Act and the Applicants have indeed shown that they will suffer irreparable harm should the order remain stayed." [Paragraph 57]

Therefore, Kusevitsky AJ ordered that the operation and execution of the order granted on 17 September 2017 was not to be suspended by the petition lodged by the Respondent, nor by any appeal lodged by the Respondent in the future. [Paragraph 58]

CRIMINAL JUSTICE

R v S (A760/17) [2018] ZAWCHC 122 (18 September 2018)

The appellant was convicted on two counts of rape of an 8-year-old minor. He was subsequently sentenced to life imprisonment on each count, which was ordered to run concurrently. Leave to appeal was granted against the conviction and sentence.

Kusevitsky AJ noted that the grounds for the Appellant's appeal were unclear, although the heads of argument questioned whether the State had succeeded to prove its case beyond reasonable doubt, given the cautionary rule that applies to a single, child witness. [Paragraph 3] Kusevitsky AJ confirmed the conviction, finding that the Magistrate had systematically dealt with the evidence, especially in terms of the testimony by a child. [Paragraph 40]

With regards to the sentence, Kusevitsky AJ emphasised that "there is no room in our society to be complacent or to be anaesthetised by the prevalence of these heinous acts perpetrated against children simply because of the seemingly frequent occurrence thereof." [Paragraph 42] Kusevitsky AJ held that the absence of severe physical injuries might be a reason to deviate from the minimum sentence, however, such a rationale did not have to apply to the crime of rape. [Paragraph 42]. Kusevitsky AJ concluded that the Appellant was a danger to the society, and his conduct "perpetuates the cycle of female oppression." [Paragraph 42]

The appel was dismissed.

ADVOCATE FRED SIEVERS SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 17 July 1958

BA, University of Cape Town (1981)

LLB, University of Cape Town (1984)

CAREER PATH

Acting Judge, Western Cape Division (April – June, July – September, October – December 2018; January – March, April – June, July – September 2019)

Advocate, Cape Bar (1990 -)

Senior Counsel (2018 -)

Legal Advisor, Metropolitan Life (1988 – 1990)

Attorney, Herbsteins Attorneys (1988 – 1989)

Articled Clerk, Herbsteins Attorneys (1986 – 1988)

Member, Cape Bar (1990 – present)

Founding member, Advocates for Transformation (lapsed)

SELECTED JUDGMENTS

PRIVATE LAW

ESAU V THE MINISTER: WESTERN CAPE DEPARTMENT OF SOCIAL DEVELOPMENT AND OTHERS, UNREPORTED JUDGMENT, CASE NO: 16305/2011 (WESTERN CAPE HIGH COURT)

Judgment delivered 26 January 2019

The Plaintiff claimed damages on behalf of his minor daughter. While the child was at school, and while playing on a swing, the wooden swing structure collapsed. She suffered severe traumatic brain injury. The consequences would have a permanent impact on all aspects of her life.

After hearing relevant witnesses and setting out the relevant legal framework in terms of the Child Care Act and the guidelines for Early Child Development Services, Sievers AJ turned to the elements of a delict. [Paragraphs 22-38] Sievers AJ concluded that the applicable legislative framework imposed the primary responsibility for ensuring that conditions at the Early Child Development facility were conducive to the proper care and safety of young children was placed on the Minister. [Paragraph 50]

Furthermore, Sievers AJ held that a finding that the acts and omissions were wrongful would not impede or disrupt the functions of the Minister. [Paragraph 57] Sievers AJ further held that the Minister had been negligent, and had failed to comply with the provisions of the Child Care Act and related guidelines. [Paragraphs 61, 68] With regard to legal causation, Sievers AJ held that the evidence established that the minor child had suffered damages. [Paragraph 75]

Sievers AJ therefore held that the Minister was liable to pay the damages suffered.

ADMINISTRATIVE JUSTICE

BASSON V ASSOCIATED PORTFOLIO SOLUTIONS (PTY) LTD AND OTHERS (16224/2018) [2018] ZAWCHC 184 (14 DECEMBER 2018)

This was an application to review and set aside a decision taken by the First and Second Respondent to debar the Applicant as a representative and key individual of Associated Portfolio Solutions (APS) and Pentagon Financial Solutions (Pentagon), in terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act). The decision to debar the Applicant was put to a vote before the board of directors. An independent chairperson conducted a disciplinary enquiry.

Sievers AJ concluded that the majority directors of APS and Pentagon were not independent or impartial when they took part in the decision to debar the applicant. [Paragraph 40] Furthermore, Sievers AJ held that under such circumstances, the majority directors should have declined their debarment powers in terms of the FAIS Act, and should have referred the matter to the Financial Services Board (FSB), or ought have appointed an impartial chairperson. [Paragraph 42] In this context, Sievers AJ pointed out that the directors were not impartial and took over the position of the complainant, prosecutor, witness and judge in cooperation with the independent chairperson in terms of the debarment proceedings. [Paragraph 48]

Against this backdrop, Sievers AJ concluded that the decision to debar the Applicant fell to be set aside. [Paragraphs 51-52]

CIVIL PROCEDURE

FINE AND ANOTHER V CHAPLIN, UNREPORTED JUDGMENT, CASE NO: 5376/2018 (WESTERN CAPE HIGH COURT)

Judgment delivered 12 September 2018

This was an application for the Respondent to be found in contempt of two orders of the High Court, and sentenced to six months direct imprisonment. In 2011, the High Court had ordered that neither party should contact each other. In 2017, a *rule nisi* was granted against the Respondent not to contact the Applicants or to publish anything related to the Applicants via the internet, social media or email. The Applicants claimed that the Respondent breached the terms of the aforementioned orders by having authored seven anonymous letters in the first quarter of 2018.

Sievers AJ found that the evidence established that the author of the letters was the Respondent. [Paragraph 49] Sievers AJ held that the Applicants had to establish a wilful and *mala fide* disregard of the 2011 and 2017 orders on the part of the Respondent. [Paragraph 55]. Sievers AJ held that the applicants had established the existence of the orders, proper notice to the Respondent, and the Respondent's contempt of the orders. The evidentiary burden then shifted to the Respondent to establish a reasonable doubt as to whether his conduct could be characterised as wilful and *male fide*. [Paragraph 57].

"It is clear that by attempting to conceal his identity the Respondent confirms that he appreciates that his conduct is unlawful. Unlawfulness and *male fides* flow naturally from the Respondent's

conduct in that he has professed a desire to continue to conduct himself in contempt of the 2011 and 2017 orders …" [Paragraph 58].

The Respondent was found to be in contempt and sentenced him to six months direct imprisonment. Respondent was also ordered to pay the costs of the application on the attorney and client scale.

CRIMINAL LAW

BEALE V S (283/18) [2019] ZAWCHC 47; 2019 (2) SACR 19 (WCC) (3 MAY 2019)

Case heard 22 March 2019, Judgment delivered 3 May 2019

(Judgment prepared by Steyn J and Sievers AJ)

The Appellant, a 39-year-old unmarried man, was convicted for possession of child pornography under section 24B(1) of the Films and Publications Act. He was sentenced to 15 years imprisonment, and appealed against the sentence. The appellant had one previous conviction, for possession of cannabis.

Steyn J and Sievers AJ found that the appellant had paedophilic disorder. [Paragraphs 27 - 28] The Court further described the seriousness of the crime, stating that every image of child pornography constituted an impairment of the dignity of a child, and that it could not be disputed that those victims would bear the emotional scar of their abuse for life. [Paragraph 15].

Based on an analysis of relevant case law including *AR*, *S v Botha, S v Binneman* and *Director of Public Prosecutions, Gauteng Division, Pretoria v Hamisi*, the Court concluded that sentences in comparable matters were merely a guide, and emphasised that an appeal court would only interfere in case of a misdirection by the court a quo. [Paragraph 44]

The Court noted that the counsel for the Appellant had difficulty in pointing out any convincing material misdirection on the part of the court a quo. Based on the circumstances of this matter, the history of abuse suffered by the Appellant in his younger days, as well as the interest of the community and ultimately the interest of children and their protection, a sentence of 10 years of imprisonment was more appropriate. [Paragraph 47] Therefore, the Court set the sentence of 15 years of imprisonment aside.

MEDIA COVERAGE

Criticism of a decision by the candidate uphold the eviction of farm dwellers and to order the City of Cape Town to provide temporary emergency shelter to them at the emergency housing site known as "Kampies"

"Wendy Pekeur of the Ubuntu Rural Women and Youth Movement was critical of the judgment. "Kampies is another dumping site like Blikkiesdorp and Wolwerivier … How will these children get to school? It is almost exam time."

"Community leader Tanya Bowers said, "The judgment doesn't understand the reality confronting the people of Klein Akker Farm." She said relocating to Kampies meant a "shift from a peaceful mixed race community to a more high risk and violent surrounding".

"Children will be forced to change schools with no guarantee of enrolment given the current situation with the Western Cape education department," she said.

Bowers said the relocation would also affect current employment and job prospects. …"

- Vincent Lali, "Court orders hundreds of Kraaifontein farm dwellers to be relocated to Philippi", *TimesLive* 24 August 2019 (Available at https://www.timeslive.co.za/news/south-africa/2019-08-24-court-orders-hundreds-of-kraaifontein-farm-dwellers-to-be-relocated-to-philippi/)

ADVOCATE HAYLEY SLINGERS

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 13 November 1972

BA, University of Cape Town (1993)

LLB, University of Cape Town (1995)

LLM in Constitutional and International Law,

University of South Africa (2002)

LLM in Criminal Justice, University of Cape Town (2006)

CAREER PATH

Acting Judge, Western Cape High Court (October – December 2017; January – February, April – June 2018; January – March, April – June 2019)

Advocate, Cape Bar (2010 – present)

Deputy Director, National Prosecuting Authority (2008 – 2010)

Senior State Advocate, National Prosecuting Authority (2003 – 2008)

State Advocate, National Prosecuting Authority (2002 – 2003)

Director, Naidoo Stellenboom Wilton Inc (1999 – 2001)

Professional Assistant, John Riley Attorneys (1997-1999)

Candidate Attorney, H Mohammed & Associates (1995 - 1997)

Member, Cape Bar (2010 – present)

Member, Junior Bar Council (2012)

Member, Advocates for Transformation (2011 – 2012)

SELECTED JUDGMENTS

PRIVATE LAW

SHOPRITE CHECKERS (PTY) LTD V DAS NEVES (11999/2018) [2019] ZAWCHC 64 (28 MAY 2019)

Case heard 6 May 2019, Judgment delivered 28 May 2019.

Applicant sought an order to confirm the expiry of a lease agreement, and an order evicting the Respondent from the premises concerned. Slingers AJ had to decide whether the landlord had a right to decide whether to renew or terminate a fixed-term lease agreement, and whether it was necessary to give notice under the Consumer Protection Act ("CPA").

In order to interpret section 14(2)(a) of the CPA, Slingers AJ referred to the objectives of the act under section 3 of the CPA and concluded that fixed-term contracts could only be extended by agreement of the parties. [Paragraphs 14-21] With reference to section 5(1) of the CPA, Slingers AJ found that if landlords were compelled to continue with fixed-term contracts after their expiry date, such a determination might increase hesitancy or refusal of such contracts. [Paragraph 25] Slingers AJ found that section 14(2)(c) of the CPA had to be interpreted in a way that provided consumers with sufficient and timeous notice which would allow them to make an informed and responsible decision pertaining to the termination and/or renewal. [Paragraph 35]

Therefore, Slingers AJ held that landlords were obliged to give tenants notice of the impending expiry of the lease agreement, irrespective of whether or not the agreement was to be terminated or renewed. [Paragraph 36] Slingers AJ concluded that the Applicant gave the Respondent valid notice of intention to terminate the lease agreement. [Paragraph 56] The lease agreement had expired, and the Respondent had to vacate the premises. [Paragraph 58]

ADMINISTRATIVE JUSTICE

RAPIVEST 12 (PTY) V AIRPORTS COMPANY SOUTH AFRICA SOC LTD AND OTHERS; AIRPORTS COMPANY SOUTH AFRICA SOC LTD V RAPIVEST 12 (PTY) AND ANOTHER (17274/2017; 17946/2017) [2018] ZAWCHC 16 (1 FEBRUARY 2018)

Case heard 4 December 2017, 1 February 2018, Judgment delivered 1 February 2018

The Applicant sought to review and set aside a tender process that was conducted by the First Respondent for a jewellery concession to be operated at Cape Town International Airport. The Second Respondent was then awarded the concession, and signed a lease agreement with the First Respondent. Before the tender process, the Applicant was in possession of the concession, and was the lessee of the premises concerned.

After the Applicant failed to file an application for judicial review within the 180-day limit under section 7(1) of PAJA, Slingers AJ had to decide whether it would be in the interest of justice to grant the application for the extension of the 180-day period. [Paragraphs 51-53] Slingers AJ set out facts and circumstances which had to be considered, such as the explanation for the delay, whether the impugned decision was given effect to, whether the delay caused any prejudice to those affected by the decision, public interest considerations, and a consideration of the merits of the review application. [Paragraph 57] Slingers AJ found that the Applicant had provided a full and adequate explanation for the delay. [Paragraph 69]. Furthermore, the lease agreement between the First and Second Respondent had not yet been not implemented. Therefore, the impugned decision was not given effect to. [Paragraph 74]

With regard to the merits of the review application, Slingers AJ rejected a defence of *lis pendens,* as asserted by the Respondent. [Paragraph 98] Moreover, Slingers AJ held that the Second respondent failed to show that it would be just and equitable to evict the Applicant from the premises. [Paragraph 101] Slingers AJ held that the validity of the lease agreement between the First and Second Respondent was called into question since it originated from an invalid award. [Paragraph 105] Slingers AJ concluded that the lease agreement was not in accordance with a system that was fair, equitable, competitive and cost effective as required by section 217(1) of the Constitution. [Paragraph 105] Furthermore, the Second Respondent had failed to prove that the Applicant was unlawfully in occupation of the premises. [Paragraphs 122-123]

Slingers AJ granted the application for an extension of the 180-day period; reviewed and set aside the award of the tender to the Second Respondent; and declared the lease agreement between the

First and Second Respondent invalid. [Paragraph 124]. An appeal to the Constitutional Court by the Second Respondent was dismissed on 2 May 2019, CCT 136/18.

CIVIL PROCEDURE

ROAD ACCIDENT FUND V CHIN (23037/2016) [2017] ZAWCHC 153; 2018 (3) SA 547 (WCC) (9 NOVEMBER 2017)

Case heard 19 October 2017, Judgment delivered 9 November 2017

The Respondent objected to a request by the Applicant to submit to a medical examination by a Doctor nominated by the Applicant, and filed a notice of objection in terms of Uniform Rule 36(3).

After referring to Uniform Rule 36(2), its possible impact on fundamental rights such as the right to privacy or bodily integrity and the case of *Durban City Council v Mndovu*, Slingers AJ found that the legislator could not have intended to limit the grounds on which an objection could be raised against a nominated doctor to carry out the medical examination. [Paragraphs 15-17] However, such an objection would have to be reasonable, material and substantial against the backdrop of the right to a fair trial. [Paragraphs 18-19]

Based on the case of *Starr v National Coal Board*, Slingers AJ concluded that such a determination must be conducted against the backdrop of facts in this case. [Paragraphs 22-24] Slingers AJ held that the affidavits by the Respondent's witnesses were not sufficiently relevant and therefore not in the interest of justice to admit as similar fact evidence. [Paragraph 36] Slingers AJ found that the objection was not reasonable. [Paragraph 37] Respondnet had failed to present a strong case regarding whether the nominated Doctor was biased. [Paragraph 40] Respondent did not demonstrate any material and substantial bias on the part of the nominated doctor. [Paragraph 45]

Slingers AJ held that the objections raised by the Respondent were not reasonable, material or substantial. [Paragraph 59] Slingers AJ further directed the Respondent to submit to a medical examination by the doctor nominated by the Applicant, and allowed the Respondent to audibly record the examination in addition to have her own medical practitioner present. [Paragraph 60]

CRIMINAL JUSTICE

MCKETHI V S, UNREPORTED JUDGMENT, CASE NUMBER: A10/2019 (WESTERN CAPE HIGH COURT)

Case heard 7 March 2019, Judgment delivered 12 March 2019

The appellant was convicted by the Regional Court on two counts of rape, and two counts of housebreaking with intent to commit an offence unknown to the public prosecutor and theft. The appellant was sentenced to an effective term of life imprisonment. The appeal was directed against conviction and sentence.

With regards to the conviction, the appellant argued that he was not the perpetrator. After reviewing the evidence led at the trial, Slingers AJ found that the appellant failed to raise an objection or challenge to one of the affidavits that were admitted by the trial court. [Paragraph 42] Furthermore, based on *S v Ntsele*, Slingers AJ held that it could not be disputed that the DNA which was found on the victims was not the appellant's DNA. [Paragraph 50] Therefore, Slingers AJ confirmed the decision by the trial court in respect of the counts of rape and housebreaking. [Paragraph 55] However, with regards to the conviction of theft, Slingers AJ held that the State failed to discharge its onus and that the facts did not support the conviction in this matter. [Paragraphs 56 - 57]

Based on *S v Rabie* and *S v Mtungwa & Another*, Slingers AJ agreed with the trial court that there were no compelling and substantial circumstances which would justify a deviation from the prescribed minimum sentence. [Paragraph 62] However, Slingers AJ found that the appellant was serving a "lengthy" sentence for robberies that he committed in 2013. [Paragraph 64] It would be inappropriate and unfair if the sentence of life imprisonment only commenced after the appellant had served a sentence for the robberies. [Paragraph 64]

The appeal against the conviction and sentence of two counts of rape and housebreaking was dismissed. The conviction and sentence for theft was set aside, and it was ordered that the sentence of life imprisonment run concurrently with the sentence that the appellant was already serving. [Paragraph 65]

MR DANIEL THULARE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 21 June 1970.

B Iuris, UNISA (1996)

LLB, UNISA (1998)

LLM, UNISA (2002)

CAREER PATH

Acting Judge

Western Cape High Court (last term 2017, all 2018, third term 2019).

Gauteng High Court (January – February 2014, April – May 2016).

Magistrate

Chief Magistrate, Cape Town (2016 -)

Senior Magistrate (2005 – 2016)

Magistrate (1999 – 2005)

Admitted as Advocate of the High Court (2002)

Candidate Attorney, Du Preez & Nkosi Inc (1999)

Prosecutor, Department of Justice (1996 – 1999)

Representative, Africa Regional Group of the International Association of Judges (2019 -)

JOASA

President (2017 -)

Provincial Chairperson (2004 – 2006)

Member (2005 – 2017 ; 2000 – 2003)

Member, African National Congress (1990 – 2006).

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

INZINGA RANCH CC V MASHIYI (A265/17) [2018] ZAWCHC 108 (23 AUGUST 2018)

This was an appeal against a decision of the Equality Court. Respondent had complained of unfair discrimination on the basis of race and gender, as well as harassment. The issues arose out of disagreements over maintenance, rental payments and other issues in respect of a property the respondent rented from the appellant.

Thulare AJ (Samela J concurring) held:

"In my view, race as envisaged in section 7(b) [of the Promotion of Equality and Prevention of Unfair Discrimination Act] refers to a concept which is built on a set of ideas working together as part of a mechanism which have an interconnecting network resulting in a composite and complex whole. The constituent parts of this concept of race include being built on structures, systems, knowledge, skills and attitudes. In its attitudes, it includes the state of mind, heart, meaning, appreciation, judgment and purpose. It refers amongst others to the intellect in the head, the emotional intelligence in the heart, the humanity in conduct, the sensibility in conclusions, recognition of the good qualities of others and the reasons for which something is done. It is this constituent part, to wit, attitudes, which the facts of this case place under the judicial microscope on this concept of race." [Paragraph 30].

Thulare AJ held that the test for unfair discrimination on the basis of race required that "the attitude of the appellant should be looked at in the context in which the appellant thought of and felt about the respondent", and that the test was an objective one, of "whether a reasonable, objective and informed person, on hearing what happened, would perceive that to be unfair discrimination based on race." [Paragraph 31]. Thulare AJ found that the sole member of the appellant (Watkins) had formed unexplained misgivings about the respondent before the lease was signed, "which were not based on facts that would ordinarily give a reasonable prospective landlord reason to hold." [Paragraph 34].

"Watkins had an inflated sense of being more equal than the respondent as parties to the agreement. His feelings of self-importance caused him to believe that he could see, think and do better than the respondent. His excessive arrogance was displayed by his disregard of the agreed terms of the lease. In his outlook and frame of mind, the respondent was not worthy of any privacy which the lease agreement envisaged in its inspection provisions, and did not deserve his consideration and respect as her humanity commanded. She did not deserve private and undisturbed use of the property." [Paragraph 39].

"The attitude of Watkins was subtle and had a semblance of innocence and a pretence of sensitivity for social expediency. It was brutal to the dignity of the respondent. It was an attack on the integrity and humanity of the respondent. The insincerity that was so trite and obvious was hidden in the absurd pretence intended to create a pleasant impression that all was above board and all was well. The sad reality and tragedy of humanity is that racists themselves believe their own charade." [Paragraph 44].

Thulare AJ found that Watkins had "haunted the respondent's residence", "tracked and chased the respondent like a prey", and "had no conscience capable of appreciation for his shameful conduct as he haunted and hounded the respondent out of his property." [Paragraph 49].

"The underlying, murking and shrouded truth is that Watkins was disquiet and dismayed, which means he had a feeling of worry and cause for concern and distress, extreme anxiety, sorrow and pain in having a lease agreement with and have an African woman in his property. … Racists prefer the supreme test for exclusion to be a mystery. It is driven by greed, self-gain and self- gratification. It seeks to render its victims vulnerable and helpless. …" [Paragraphs 53 - 54].

Thulare AJ held that the case was "a run-of–the–mil [sic] claim for equal worth", and dismissed the appeal.

ADMINISTRATIVE JUSTICE

DYER EILAND VISSERYE (PTY) LTD V MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES AND ANOTHER (11914/17) [2018] ZAWCHC 162 (13 NOVEMBER 2018)

The second respondent had revoked the applicant's fishing right, a decision upheld by the first respondent following an internal appeal. The applicant sought to set aside the decision. The key issue was held to be whether the applicant had exceeded its fishing quota for the 2015 season [Paragraph 3].

Thulare AJ held that:

"The applicant was entitled to have the second respondent set out the allegations that creates the basis for a section 28 notice. The applicant was entitled to be informed by the charges against it with precision, or at least with a reasonable degree of clarity, what the case is that it had to meet – [*S v Hugo* 1976(4) SA 536 (AD) at 540E]." [Paragraph 6].

Thulare AJ found that the applicant had raised alternative facts when appealing the decision to the first respondent, rather than raising them with the second respondent. As a result, the second respondent had not ruled on the issues put before the first respondent [Paragraphs 8 - 11].

"In my view, once the applicant had filed their papers on appeal, it was incumbent upon the second respondent to consider the grounds of appeal and then amongst others file a statement in response to the appellant's allegations. Nowhere does second respondent set out the issues between the parties, which were already clear and known at the time of the compilation of the report. It does not demonstrate any intelligible engagement with the issues between the parties. The report shows no understanding of the facts and advanced no reasons to guide the Minister in understanding why the Department arrived at the decision it did and why that decision was to be preferred and accepted and the case of the applicant rejected. … The report represents a classic case of failure by a senior official of a Department to guide a Minister on an appeal against an administrative decision. After seven (7) pages of

writing, not a single syllable is facile enough to convey the reasons for the conclusion …" [Paragraphs 12 – 13].

"… The record of the decision of the Minister should evidence a detailed examination of the elements and structure of the dispute. The process through which the Minister separated the constituent parts of the whole case, contrasting the striking difference between the cases of the Department and the appellant before him, and the reasons for the acceptance of one case or legal argument over another must appear from the record. … There has to be a demonstrable record that the Minister reviewed the controlling issues in the dispute. I am unable to find any evidence of such industry on the record of the decision of the Minister on appeal. I am unable to conclude that the applicant's case was properly considered, if at all by the Minister." [Paragraph 14].

"Some of the reasons advanced by the applicant to upset the decisions of both the Department and the Minister did not deserve the dignity of a comment, but for the entitlement to lawlessness which they advocate for. The applicant appears to pride itself and many other rights holders in the fishing industry to conduct which in my view is unconscionable. …" [Paragraph 15].

The decisions of the first and second respondents were set aside, and the case was remitted to the second respondent to consider the applicant's responses to the allegations made against it, and re-determine the matter.

CRIMINAL JUSTICE

S V MADHINHA 2019 (1) SACR 297 (WCC)

Case heard 7 December 2018, Judgment delivered 7 December 2018

The accused attempted to obtain a police clearance certificate, and in so doing discovered that he had a criminal record due to an admission of guilt fine paid 8 ears previously. The accused had been arrested, detained and given a written notice which included a provision for payment of an admission of guilt fine without appearing in court. The accused paid the fine and was released. In the present proceedings, the accused applied for the deemed conviction and sentence to be set aside.

Thulare AJ (Dolamo J concurring) considered the meaning of section 57(6) and (7) of the Criminal Procedure Act, which regulate the payment of an admission of guilt fine at a police station or local authority, and the process thereafter:

"The conviction and sentence of an accused in terms of s 57(6) is sui generis. It is not a verdict. It is not even a pronouncement by the clerk of the court. It is an automatic consequence of an administrative act performed by a member of the court's support services. It automatically follows on the clerk of the court performing his or her clerical duties. …" [Paragraph 15]

Thulare AJ noted that the administrative duties performed by the clerk of the criminal court pursuant to section 57(6) of the Criminal Procedure Act were set out in codified instructions complied by the Department of Justice. Performance of those duties resulted in an automatic conviction and sentence in accordance with section 57(6), and took the view that "the clerk … simply enters on court records what is essentially an agreement between the state and the accused." [Paragraph 16] Thulare AJ held further

that section 57 provided a mechanism "to provide for settlement of trivial disputes between the state and an accused person where neither party wishes to go through a long trial procedure and both are willing to bring their dispute to a quick end" [Paragraph 17], and that an admission of guilt under s 57 was distinguishable from an unequivocal admission of guilt under s 217 of the Act [Paragraphs 18 – 19].

Thulare AJ held further that:

"The previous convictions envisaged in s 271 of the Act have serious consequences for an accused ... In my view this cannot be prior conduct and the manner in which an accused thought he or she behaved towards others, seen against his or her own view of the accepted norms of society, generally without having obtained legal advice. A finding on such past conduct and the pronouncement of the conviction, because of its serious implications, in my view, should only follow where the evidence has established the guilt of the accused beyond reasonable doubt. In a criminal matter, in my view, the only competent authority to make a pronouncement with such dire consequences should be a judicial authority, which is vested in the courts ... A conviction referred to in s 57(6) of the Act is not such a conviction." [Paragraph 30]

"A conviction and sentence following an entry into the admission-of-guilt record book by the clerk of the criminal court in the magistrates' court is not a conviction whose record is permanent. It was not a conviction and sentence to be entered in the criminal record system by the South African Police Service. ..." [Paragraph 44]

The conviction and sentence were thus set aside, with a copy of the order to be served on the Minister of Police.

In **Mong v Director of Public Prosecutions and Another (17593/2018) [2019] ZAWCHC 106 (23 August 2019)**, a different composed bench of the Western Cape High Court declined to follow the **Madhinha** decision [see paragraphs 62 – 82]. The court (per Henney J, Samela J concurring) held that:

> "It is clear that the decision of this court in the case of *Madhinha*, besides the fact that it is clearly wrong, will have, as a consequence, a disastrous effect on our criminal justice system, especially when it relates to the payment and the legal effect of an AOG [admission of guilt] fine for certain offences. ... The court in that case, with the greatest respect, clearly and demonstrably misinterpreted the law regarding this aspect. ..." [Paragraphs 62 – 63]

The court further held that the **Madhinha** decision was at odds with existing Appellate Division authority [paragraph 65], had "simply failed to examine the aim and purpose of the proviso in subsection (7) of section 57" [paragraph 66], and that it potentially led to unequal treatment of those who chose to pay and admission of guilt fine compared to those who did not [Paragraph 68]. The court held that the decision "would also have deleterious and far reaching consequences for society where, for example, an abusive partner would regularly commit a relatively serious violent offence, like common assault, on his or her partner, would choose to pay an AOG fine and would then not attract a previous conviction." [Paragraph 69].

S v FREDERICK AND ANOTHER 2018 (2) SACR 686 (WCC)

Case heard 11 July 2018, Judgment delivered 11 July 2018.

Two matters came before the high court on review, the accused having been charged with "unlawful possession of a minimal amount of an undesirable dependence-producing substance" under the Drugs and Drug Trafficking Act. The accused had pleaded guilty and were sentenced to terms of imprisonment (suspended in respect of one of the accused).

Thulare AJ (Dolamo J concurring) found that the law referred to in sentencing the first accused was "simply confusing", and rendered the sentence "incapable of being made an order of court", and thus "called for intervention." [Paragraph 5] Thulare AJ held that two further issues required attention, namely the proportionality of the sentences, and "the approach to sentencing in offences where, unless there is direct evidence to the contrary, the direct consequences of the offence are for all intents and purposes mostly suffered by the person of the perpetrator himself, whilst others may suffer indirectly and often secondarily." [Paragraph 6].

Thulare AJ held further:

"Generally, drugs are abused by the emotionally afflicted. Substance abuse is a manifestation of an emotional response to uncertain future developments which induce fear. Drug abuse is often a symptom of a flight from reality, or a retreat into the self so that one does not deal with the fear of powerlessness because of the behaviour of others towards one's self-worth, or what one perceives as an unfair distribution of power and ability. Abuse of drugs is often a comfort zone for those who are at the imaginary train station of life, waiting for their turn to board on the railway line to a better life and prosperity. … Primarily, it is a crime against one's own self. It is a lifestyle. It is what one selects as his or her way of life, as opposed to selection of what one necessarily requires to live. It is more of a social wrong than it is a serious crime. …" [Paragraphs 8 - 9]

"Both accused … present one clear message, to wit, long-term imprisonment or the fear thereof is not an answer to crimes primarily against one self in general, and, in particular, substance abuse as a lifestyle choice. Prisons are not like some sausage-producing machines where you put a stump of meat in the one end through a grinder and you find ground tube-squeezed meat on the other end. In each and every case in repeated substance-abuse matters, in my view, attempts should be made, in crafting an appropriate sentence, to try and establish where the accused dropped the ball of his or her vision for their life, and what contributed to that ball being dropped. Courts should strive in their sentencing, as the faith leaders would say, 'to win back the soul' outside of the prison. The 'hit back' approach of the majority of our magistrates' courts is clearly not working." [Paragraph 10]

Thulare AJ held that magistrates' courts hearing such cases should bear in mind that there was a "comprehensive national response" for dealing with substance abuse, and that the NPA "should call for a probation officer to investigate the circumstances of an accused", and furnish a pre-trial report "recommending the desirability or otherwise of a prosecution." [Paragraphs 11 – 12].

The sentences were set aside, and the matters were remitted to the trial court to consider holding an enquiry in terms of the Prevention and Treatment for Substance Abuse Act.

SELECTED ARTICLES

'Y 2 4 JESUS: ZION, WHERE INDIGENOUS KNOWLEDGE MEETS CHRISTIANITY', Author House, 2010.

The synopsis of the book on the Amazon.com website states that:

"The book seeks to explain the knowledge systems of the Indigenous people and seeks to demonstrate that the thinking, in general, that Indigenous knowledge is inferior, 192nbiblical or UnChristain can no longer be sustained. This is done through scriptural references. An explanation is also given of some practices, traditions and the hierarchical organogram of Indigenous Churches in South Africa through scriptures" (see https://www.amazon.com/Jesus-Where-Indigenous-Knowledge-Christianity/dp/1449076009).

'MAGISTRATES AS PRIMARY DRIVERS AND PLAYERS IN THE CHANGE PROCESSES IN CHILD JUSTICE AND THE PLIGHT OF AN UNACCOMPANIED FOREIGN CHILD', Paper presented at a Child Justice Seminar, Polokwane, 2009. (Available at http://www.ipt.co.za/pdf/Child_Justice_and_the_plight_of_unaccompanied_foreign_children.pdf**).**

"Mothering, in Africa, has got nothing to do with conception, gestation period, labour pains, giving birth, sex or gender. Just to illustrate the point, there were no prisons in South Africa before the arrival of Jan van Riebeeck. Today, a prison visit by a Magistrate and a discussion with prisoners reveals that the absence of mothering is almost the sole cause of prison overcrowding." [Page 1]

"It is because of the apologetic view towards children that we refuse to acknowledge that in the foundation phase, which is between the ages of six and ten, punishment of the child is a necessary evil to help correct behaviour. Apologists have succeeded in elevating a tool of discipline, whatever the circumstances, to abuse - so much so that parents, including Magistrates and Judges, do not know whether physical correction of a child's behaviour by a parent is acceptable or not, and if it is, where the line is between discipline and violence or abuse. Apologists have blurred, if not removed, the line." [Page 3].

"My sense of justice finds the provisions of section 47 (2) (b) (i) of the Child Justice Act … objectionable. To have diversion founded by acknowledgement of responsibility by the child is simply too close to injustice for my comfort. In my view, we appear to be happy to bury justice in the cemetery of statistics for the National Prosecuting Authority. If it is in the best interests of the child to divert, we should divert. We should not only divert when the response of the child places a smile on the face of the prosecutor." [Page 10].

MEDIA COVERAGE

Remarks quoted at the 2019 JOASA annual general meeting:

"Outgoing president of the Judicial Officers Assocation of South Africa, Daniel Thulare, gave his presidential address at the association's AGM in Johannesburg this weekend, urging the Minister of Justice and Correctional Services to back calls for a symposium that would include 'judicial officers of all ranks'. The proposed symposium, given strong support by Joasa's members during the AGM's business meeting, would allow all the country's judicial officers to define what was meant by a 'single judiciary' and to identify the consequences that would follow from that definition.

The 'heads of courts' … met 'at the pleasure and invitation' of the Chief Justice, Thulare said. Conspicuously absent from those meetings were the chief magistrates and regional court presidents who were also heads of magistrates court at district and regional level. 'There are no reasons advanced as to why the current decision-making governance structure of the judiciary excludes the magistracy.' …

For magistrates to be represented by a judge president at the heads of court meeting of the judiciary, was like the days of 'marital power', Thulare said. … It was a 'paternalistic idea' that had been discarded in the new democratic, constitutional South Africa, and to treat magistrates in this way was 'problematic'. …

The office of the Chief Justice was not a 'judicial kingdom', he said. A new document from that office had been sent to the Minister of Justice and Correctional Services, Ronald Lamola. It outlined an institutional model for the judiciary and proposed a new judicial council. Addressing the Minister, who attended the meeting, Thulare said, 'I have to tell you that we in Joasa do not support it.' The proposed model excluded SA's 2000 magistrates. 'They are not represented in this plan. You should send it back for that reason alone.' He urged the Minister, 'Whenever you engage with the judiciary, please ask – where are the magistrates?':

- Carmel Rickard, *'Over-concentration of power in hands of Chief Justice' – Joasa president* (28 July 2019), available at http://carmelrickard.co.za/over-concentration-of-power-in-hands-of-chief-justice-joasa-president/

Quoted while presiding over an Equality Court case against Democratic Alliance MP Dianne Kohler-Barnard:

"Magistrate Daniel Thulare, presiding over the matter in the Cape Town Regional Court building, was visibly annoyed because Kohler Barnard had not submitted "even one line" in an affidavit to help him decide whether there was still a possibility of mediation.

"She isn't even here," said Thulare, suggesting that Kohler Barnard might be employing a "Stalingrad strategy" in her handling of the accusation by Louw Nel, who lodged the complaint.

He expressed a concern that without Kohler Barnard's side of the story, it was difficult to tell whether the court would be involving itself in settling a "robust political debate" that could be better managed in a different forum."

- Jenni Evans, "'Xenophobic, racist and sexist': Case against DA MP Kohler Barnard goes to Equality Court", *News24* 28 March 2019 (Available at

https://www.news24.com/SouthAfrica/News/xenophobic-racist-and-sexist-case-against-da-mp-kohler-barnard-goes-to-equality-court-20190328).

"The South African Insurance Association (SAIA) has noted comments by Magistrate Daniel Thulare that were published in the Sowetan on Monday, 8 February 2010 which included that "any conviction for a citizen driving without a licence will be unlawful if the state has failed to test that person".

""Whilst it is acknowledged that there are challenges in the driver's licence booking system, the SAIA cannot support the statement made by Judge Thulare. It is against the law to drive without a valid driver's license. Insurance policy terms and conditions support the law of the country, and require that a driver authorised to drive an insured vehicle should hold a valid driver's licence. The insurance industry will not honour any claims where individuals driving a vehicle are not in possession of the relevant valid driver's license, as required by the terms and conditions of the policy," ...

- South African Insurance Association, *Insurance Industry Warns Against Driving Without a Valid Driver's License*, available at https://saia.co.za/newSite/index.php?id=344